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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE LOUISIANA LAND AND EXPLORATION COMPANY,
Petitioner,

v.

TEXACO, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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January 5, 1987

QUESTION PRESENTED

Whether the Natural Gas Policy Act, in incorporating pre-existing contract prices as the federal price ceiling for certain natural gas, gives producers the power to limit the value of natural gas and their corresponding royalty obligations not only with respect to gas specifically tied to such contracts, but also with respect to any gas that happened to be sold in connection with sales contracts that do not specify the origin of the gas to be supplied.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING THE WRIT	9
1. The Decision Below Raises An Important Question Concerning the Meaning and Administration of the Natural Gas Policy Act	9
2. The Decision Below is Novel and Directly at Odds with the Views of Those in the Federal Government Responsible for Administering the Natural Gas Policy Act	14
CONCLUSION	16
APPENDICES	
APPENDIX A—Louisiana Supreme Court's Order of September 4, 1986 Denying Petitioner's Request for Reconsideration	1a
APPENDIX B—*Louisiana Land and Exploration Company v. Texaco, Inc.*, 491 So. 2d 363 (La. 1986)	4a
APPENDIX C—*Louisiana Land and Exploration Company v. Texaco, Inc.*, 478 So. 2d 926 (La. Ct. App. 1985)	15a

TABLE OF CONTENTS—Continued

Page

APPENDIX D—Opinion and Judgment of the Louisiana Trial Court of October 5, 1984 ..... 22a

APPENDIX E—Report and Proposed Judgment of the Louisiana Commissioner and Judge Ad Hoc of August 27, 1984 ..... 25a

APPENDIX F—*Amoco Production Co.*, 78 IBLA 93 (Dec. 19, 1983) 32a

APPENDIX G—F.E.R.C. General Counsel Letter Opinion, ¶ 4,972, 1982 Federal Programs Advisory Service (Apr. 8, 1982) 46a

APPENDIX H—F.E.R.C. General Counsel Letter Opinion, ¶ 4,391, 1981 Federal Programs Advisory Service (Feb. 4, 1980) 52a

TABLE OF AUTHORITIES

CASES — Page

Amoco Production Co. v. Hodel, 627 F. Supp. 1375 (W.D. La. 1986), *appeal docketed*, No. 86-4168 (5th Cir. Mar. 11, 1986) 8-9, 12, 15

Energy Reserves Group v. Kansas Power & Light, 459 U.S. 400 (1983) 11

Public Service Commission v. Mid-Louisiana Gas Co., 463 U.S. 319 (1983) 10-11, 13

ADMINISTRATIVE DECISIONS

Amoco Production Co., 78 IBLA 93 (Dec. 19, 1983) 8, 15

STATUTES

The Natural Gas Act, Ch. 556, 52 Stat. 821, 15 U.S.C. §§ 717-717w (1982) 10-11, 13

The Natural Gas Policy Act of 1978, Pub. L. 95-621, 92 Stat. 3352, 15 U.S.C. §§ 3301-432 (1982) ..... *passim*

15 U.S.C. § 3315 (1982) ..... *passim*

15 U.S.C. § 3316(b) (1982) 13

15 U.S.C. § 3319 (1982) ..... *passim*

28 U.S.C. 1257(3) (1982) 2

La. Rev. Stat. Ann. § 31:137 (West 1981) 6

LEGISLATIVE AUTHORITIES

S. Rep. No. 436, 95th Cong., 1st Sess. (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 7855 6

124 Cong. Rec. S28,633 (1978) (statement of Sen. Jackson) 13

124 Cong. Rec. S28,665 (1978) (statement of Sen. Pearson) 10

MISCELLANEOUS AUTHORITIES

F.E.R.C. General Counsel Letter Opinion, ¶ 4,391, 1981 Federal Programs Advisory Service (Feb. 4, 1980) 15

TABLE OF AUTHORITIES—Continued

Page

F.E.R.C. General Counsel Letter Opinion, ¶ 4,972, 1982 Federal Programs Advisory Service (Apr. 8, 1982) 11, 14-15

Note, *Legislative History of the Natural Gas Policy Act: Title I*, 59 Tex. L. Rev. 101 (1980) 10, 13

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

The Louisiana Land and Exploration Company ("LL&E") petitions for a writ of certiorari to review the judgment of the Supreme Court of Louisiana.[1]

OPINIONS BELOW

The Louisiana Supreme Court's order denying petitioner's request for reconsideration of the court's ruling (App. A) is unreported; the Louisiana Supreme Court's ruling on the merits (App. B) is reported at 491 So. 2d 363 (1986); the opinion and order of the Louisiana appellate court (App. C) are reported at 478 So. 2d 926 (1985); the opinion and judgment of the Louisiana trial

[1] The parties below were LL&E and Texaco, Inc. One of LL&E's wholly-owned subsidiaries, LL&E (Netherlands), Inc. is a 50% owner of Clam Petroleum Co.; another wholly-owned subsidiary, Kaluakoi Corp., is a 50% partner in Kepuhi Partnership.

court (App. D), and the report and proposed judgment of the Louisiana Commissioner and Judge Ad Hoc (App. E) are unreported.

JURISDICTION

The opinion of the Supreme Court of Louisiana was issued on June 23, 1986, and a timely petition for rehearing was denied on September 4, 1986. On petitioner's application, Justice White extended the time for filing a petition for writ of certiorari to January 5, 1986. This Court has jurisdiction under 28 U.S.C. § 1257(3) (1982).

STATUTORY PROVISIONS INVOLVED

Section 105 of the Natural Gas Policy Act, 15 U.S.C. § 3315 (1982), provides in relevant part:

> "(a) *Application*
>
> The maximum lawful price computed under subsection (b) of this section shall apply to any first sale of natural gas delivered during any month in the case of natural gas, sold under any existing contract or any successor to an existing contract, which was not committed or dedicated to interstate commerce on November 8, 1978.
>
> (b) *Maximum lawful price*
>
> (1) *General rule*
>
> Subject to paragraphs (2) and (3), the maximum lawful price under this section shall be the lower of—
>
> (A) the price under the terms of the existing contract, to which such natural gas was subject on November 9, 1978, as such contract was in effect on such date; or
>
> (B) the maximum lawful price, per million Btu's, computed for such month under section 3312 of this title (relating to new natural gas)."

Section 109 of the Natural Gas Policy Act, 15 U.S.C. § 3319 (1982), provides in relevant part:

> "(a) *Application*
>
> The maximum lawful price computed under subsection (b) of this section shall apply to any first sale of any natural gas delivered during any month, in the case of any natural gas which is not covered by any maximum lawful price under any other section of this part, including—
>
> . . .
>
> (3) natural gas which was not committed or dedicated to interstate commerce on November 8, 1978, and which was not subject to an existing contract on such day . . . .
>
> (b) *Maximum lawful price*
>
> (1) The maximum lawful price under this section for any month shall be—
>
> (A) $1.45 per million Btu's, in the case of April 1977; and
>
> (B) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this paragraph for the preceding month multiplied by the monthly equivalent of the annual inflation adjustment factor applicable for such month."

STATEMENT

This case is one of several now pending in various courts around the country in which natural gas producers seek to limit their royalty obligations to land owners by invoking § 105 of the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-432 (1982) ("NGPA"). Typically, these cases involve long-term leases between a producer and a mineral interest owner (often the state or federal government) under which the producer has promised to compensate the owner for taking natural gas from

the land by paying a royalty based on the "fair" or "market" value of the gas removed, thereby freeing the producer to enter into whatever sales arrangements it deems favorable to it without the need for review and approval of the land owner. Acting under arrangements such as these, many producers entered into long-term sales arrangements with their affiliates or with third parties to supply gas from some unspecified source at prices that, although presumably favorable at the time the contract was first made, have become very disadvantageous to the seller as market prices have risen. Faced with a royalty obligation based on fair value, rather than actual sales price, the producers have sought to shift the loss to the royalty owners by arguing that § 105 of the NGPA, by incorporating actual contract prices into the federal natural gas price regulation system with respect to gas "sold under" and "subject to" contracts in existence in 1978, has effectively limited the fair value of the gas with which they eventually chose to satisfy their supply obligations and thereby limited their royalty obligations correspondingly.

The present case illustrates the problem. Petitioner LL&E owns certain gas-producing lands in the State of Louisiana. By a series of eleven leases dated between 1928 and 1966, LL&E gave to Texaco, Inc. the right, among other things, to enter onto the land, explore for natural gas, produce any natural gas that it finds, and dispose of such gas in any way that it sees fit, including selling it to third parties or keeping it for Texaco's own use. In return, Texaco promised under each of the leases to pay LL&E a royalty on any gas produced. Although the language used in the leases varied slightly, all essentially provided that Texaco would pay a royalty of a specified percentage of the "fair" or "market" value of the gas produced from the LL&E property. The leases did *not* base the value on which LL&E's royalties were computed on the price actually received by Texaco for the gas.

Since the 1950s, Texaco has produced substantial quantities of gas from one or more of the properties subject to its eleven leases with LL&E. Texaco has chosen to dispose of this gas and other gas it controlled by delivering it intrastate to several Louisiana industrial customers in satisfaction of Texaco's obligations under a series of long-term sales contracts entered into as long ago as 1952. These sales contracts are of the type known in the industry as "warranty" contracts. Under such warranty contracts, Texaco is obligated to deliver certain quantities of gas from unspecified sources, and retains the flexibility to fulfill its obligations with gas drawn from any source around the world. Unlike a "dedication" or "commitment" contract under which a seller commits specific sources to the performance of the contract, under a warranty contract a purchaser cannot demand delivery from any specific source; only the general warranty of the seller stands behind the seller's obligation to deliver the specified quantities of gas.

Despite the express lease provisions requiring Texaco to pay royalties to LL&E according to an objective standard, Texaco from the beginning has paid royalties based on the purchase price paid by its customers, without regard to prevailing market prices. As a result, LL&E has received royalty payments based on the net $.18/Mcf price that Texaco has collected on its warranty contract sales of gas produced from LL&E's lands. At first this posed little problem, as the purchase prices originally negotiated by Texaco roughly reflected conditions in the natural gas market. With the energy crises of the 1970s, however, Texaco's original choice to enter into long-term, fixed price contracts proved increasingly improvident as market prices soared far above those agreed to by Texaco in its warranty sales contracts. Intrastate gas sales—which were not subject to any federal price ceiling before the enactment of the NGPA in 1978—rose as high as

$2.39/Mcf prior to 1978,[2] eight times the warranty contract price that Texaco was receiving.[3]

On October 15, 1981, LL&E gave Texaco written notice of its objection to Texaco's continuing to pay royalties based upon the purchase price received by Texaco, rather than the fair value of the gas produced from LL&E lands. This was followed by a formal written demand for proper payment of royalty pursuant to Louisiana statute, La. Rev. Stat. Ann. § 31:137 (West 1981). When Texaco refused to comply, LL&E on July 29, 1982, filed a petition for damages in the Civil District Court for the Parish of Orleans. Although the petition for damages does not specify the amount owed, LL&E throughout the proceedings in the state courts estimated the amount at issue to be in excess of $100 million.

After filing its answer to LL&E's petition for damages, Texaco moved for partial summary judgment. The sole basis for Texaco's motion was its assertion that § 105 of the NGPA froze the sales prices specified in Texaco's intrastate sales contracts with the Louisiana industrial consumers as ceiling prices and thereby limited as a matter of federal law the "value" on which Texaco was obligated to pay royalties to LL&E.[4] In response, LL&E opposed Texaco's motion for partial summary judgment and cross-moved for partial summary judgment in its favor. LL&E agreed that under Louisiana law any ap-

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[2] *See* S. Rep. No. 436, 95th Cong., 1st Sess. 8 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 7855, 7856. Subsequent to the NGPA's enactment, at times relevant to the instant suit, some intrastate prices rose to as much as $8.29/Mcf.

[3] Although Texaco based its royalty payments to LL&E on the net $.18/Mcf price it received under its warranty contracts, Texaco collected a gross warranty contract price of approximately $.30/Mcf.

[4] Texaco's motion was only for partial summary judgment because LL&E's petition for damages asserted shortfalls other than those that Texaco attributed to gas assertedly governed by § 105 of the NGPA.

plicable federal price ceiling would limit the value of natural gas for royalty purposes. However, LL&E argued that its gas was not "subject" to an existing contract, making the substantially higher price ceiling of § 109 of the NGPA applicable, rather than the contract prices that Texaco argued were incorporated by § 105.

The parties' cross-motions for summary judgment were first considered by a Louisiana Commissioner and Judge Ad Hoc (the Louisiana State equivalent of a magistrate in the federal system), who issued a report and proposed judgment to the Louisiana District Court in favor of Texaco. (App. E.) According to the Commissioner, the gas produced from the LL&E lands was subject to the pricing restrictions of § 105 of the NGPA.

The Louisiana District Court rejected the Commissioner's proposed ruling. (App. D.) In granting summary judgment in favor of LL&E, the trial court found that the language of the NGPA, taken as a whole, required that, for gas to be governed by § 105 restrictions, it not only had to be "sold under" but also had to be "subject to" a contract in existence at the time the NGPA was enacted. The court found that gas sold pursuant to a warranty contract was not "subject to" the contract because the seller was not obligated to supply gas from any particular source. Accordingly, the gas was not governed by § 105, but by § 109, which expressly applied to intrastate gas that was "not subject to an existing contract" prior to the enactment of the NGPA.

On appeal, the Louisiana Court of Appeal upheld the trial court's grant of summary judgment in LL&E's favor. (App. C.) The court agreed that the LL&E gas in question was not "subject to" Texaco's long-term sales contracts because nothing in those contracts required Texaco to use the gas from LL&E lands to satisfy its obligations.

After unsuccessfully seeking reconsideration in the Louisiana Court of Appeal, Texaco sought and obtained

review on writ of certiorari from the Louisiana Supreme Court which, by a vote of four to three, reversed the rulings of the lower Louisiana courts. (App. B.)

The Louisiana Supreme Court's majority opinion was based on two principal points. First and most important, the majority relied upon a decision of the United States District Court for the Western District of Louisiana that had been issued since the Louisiana Court of Appeal decision in this case. In the federal case, *Amoco Production Co. v. Hodel*, 627 F. Supp. 1375 (W.D. La. 1986) (now pending on appeal to the Fifth Circuit),[5] the United States government is the royalty owner. As such, it sought increased royalties from the producer under leases essentially the same as those at issue here and was met, as here, by the producer's argument that the "value" of the gas involved was limited by § 105 of the NGPA even though the gas was sold under warranty contracts. The administrative body responsible for reviewing such matters, the Department of Interior's Board of Land Appeals ("IBLA") had ruled, like the lower Louisiana courts, that gas sold pursuant to warranty contracts was not "sold under" or "subject to" existing contracts within the meaning of § 105 in view of the producer's discretion under such contracts to use or not to use particular sources of gas to fulfill its supply obligations.[6] The United States District Court disagreed with the IBLA interpretation of § 105, but based its ruling for the United States on the (substantially inconsistent) ground that the enactment of the NGPA price ceilings did not supersede a proper previous administrative valuation of the gas in question where the producer was not required, but instead *elected*, to use the gas so valued to fulfill its warranty contract obligations.

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[5] The *Amoco* appeal has been fully briefed and was argued to the Fifth Circuit on November 5, 1986.

[6] *See Amoco Production Co.*, 78 IBLA 93 (Dec. 19, 1983), set forth in App. F.

In addition to the *Amoco* decision, the majority of the Louisiana Supreme Court based its reversal on its conclusion that, despite the express language of § 105, the applicability of § 105 depended solely on whether the gas was "sold under," rather than "subject to," the Texaco contracts. In its view, gas could be "sold under" a warranty contract even if it could not be "subject to" such a contract. Since it concluded that § 105 governed the gas sold under warranty contracts, the majority determined that the alternative price ceiling embodied in § 109 could not apply.

On July 7, 1986, LL&E timely filed its application for rehearing with the Louisiana Supreme Court, which, on September 4, 1986, denied the application by a vote of four to three. (App. A.) On November 3, 1986, LL&E applied to Justice White for an extension of time in which to file its petition for certiorari, which was granted until January 5, 1987, in an order signed November 4, 1986.

REASONS FOR GRANTING THE WRIT

There are two reasons why this Court should grant certiorari to review the decision of the Louisiana Supreme Court in the present case: (1) The decision presents a question of substantial and increasing importance for the interpretation and application of a major federal statute, the NGPA; (2) the decision is novel and contrary to the views of those in the federal government most directly responsible for administering the NGPA.

1. The Decision Below Raises an Important Question Concerning the Meaning and Administration of the Natural Gas Policy Act.

This case presents a question of substantial and increasing importance for the administration of the Natural Gas Policy Act: Does the NGPA incorporation of pre-existing contract prices for certain natural gas apply not only to gas specifically tied to such contracts,

but also to any gas that happened to be sold in connection with sales contracts that do not specify the origin of the gas to be supplied? This question can arise in two quite different contexts: Where the producer seeks to increase the price for uncommitted gas after a warranty contract has terminated, and where (as here) the producer remains bound to the purchaser by an unfavorable warranty sales contract and seeks to shift the burden to its lessor by arguing that it could not have gotten a higher price even absent the contract because of federal price regulation. Whatever the context in which it arises, however, the question is important primarily because it goes to the very heart of the policy underlying the NGPA, and also because it involves substantial sums of money to royalty owners (both private and public) such as LL&E, the State of Louisiana, and the United States.

As recognized by this Court on prior occasions, one of the principal purposes of the NGPA was to bring interstate natural gas prices into line with intrastate gas prices.[7] Under the predecessor to the NGPA (the Natural Gas Act, 15 U.S.C. §§ 717-717w (1982)) interstate gas had been extensively regulated, while intrastate gas was free from federal price regulation. This had resulted in severe gas shortages in the interstate market, with resulting curtailment of service, as producers sought to take advantage of the generally higher intrastate gas prices.

In order to alleviate this problem, Congress in enacting the NGPA sought (1) to encourage natural gas production through price incentives to producers of all natural gas, both intrastate and interstate, and (2) to eliminate the disincentive to sell in the regulated interstate market by bringing those prices in line with the higher priced intrastate market. In furtherance of these objec-

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[7] *See Public Service Comm'n v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 330-31 (1983). *Accord*, 124 Cong. Rec. S28,665 (1978) (statement of Sen. Pearson); Note, *Legislative History of the Natural Gas Policy Act: Title I*, 59 Tex. L. Rev. 101, 112, 120-21 (1980).

tives, the NGPA established essentially two regulatory provisions for existing gas—one for interstate gas and one for intrastate gas.[8] Thus, with respect to gas that already had been committed or dedicated to be sold in the interstate market prior to the enactment of the NGPA, § 104 set a ceiling price that as of 1978 equalled the regulated price set by the Federal Power Commission under the Natural Gas Act. The § 104 price was to be increased gradually over time by the rate of inflation in order to bring it into line with the higher intrastate prices.

With respect to intrastate gas that was not already contractually committed or dedicated for sale before the enactment of the NGPA—that is, not "subject to" an existing contract—§ 109 provided a ceiling price that was essentially the same as the ceiling price provided in § 104 for existing interstate gas. Intrastate gas that was contractually committed for sale prior to the NGPA—that is, "subject to" and "sold under" contracts predating the NGPA—would be governed by § 105, which established the contract price as the federal ceiling price, with provisions designed over time to bring many, but not all, contract prices into line with the ceiling price established for new interstate gas under § 102.

The Congressional policy expressed in § 105 is thus "to hold intrastate sellers of flowing gas to bargains reached before date of enactment" of the NGPA.[9] The decision below frustrates that policy by ignoring the express re-

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[8] In addition to these price provisions for existing gas, the NGPA contains various special pricing provisions for new gas that are not relevant here. These provisions served the other principal purpose behind the NGPA: encouragement of new exploration and production of natural gas. *See Energy Reserves Group v. Kansas Power & Light*, 459 U.S. 400, 405-06 (1983); *Public Service Comm'n v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 334-36, 347 (1983).

[9] *See* the opinion of the General Counsel of the Federal Energy Regulatory Commission (App. G at 49a) which is discussed at pp. 14-15, *infra*.

quirement that gas be "subject to" an existing contract in order for the contract price to become the ceiling price under § 105. It is accordingly not surprising that the decision below is contrary to the rulings (discussed at pp. 14-15, *infra*) of the federal agencies—the Federal Energy Regulatory Commission and the Department of the Interior—charged with interpreting and applying the NGPA. Whether right or wrong, however, the decision goes to the very heart of one of the primary purposes of the NGPA—reconciling interstate and intrastate gas prices in accordance with contractual commitments.

The extent to which the decision of the Louisiana Supreme Court could interfere with Congress' attempt to reconcile intrastate with interstate gas prices can be seen from the substantial sums of money involved in this and other similar cases now pending. In this case alone, LL&E estimates that the difference between applying the price restriction of § 105 and that of § 109 amounts to more than $100 million in royalty payments. Similarly, significant amounts appear to be at stake in the *Amoco* case now pending in the Fifth Circuit, in a case now pending in federal district court in Texas,[10] and in several other pending Louisiana state court actions.[11] Certainly such a

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[10] *Shelton v. Exxon Corp.*, No. H-83-1575 (S.D. Tex. *filed* Aug. 6, 1980).

[11] *See Texaco, Inc. v. Estate of Falgout*, No. 21950 (29th Judicial Dist. Ct. *filed* July 22, 1980); *Texaco, Inc. v. Nemours Corp.*, No. 21951 (29th Judicial Dist. Ct. *filed* July 22, 1980); *Texaco, Inc. v. Baumgarten*, No. 21952 (29th Judicial Dist. Ct. *filed* July 22, 1980); *Texaco, Inc. v. Estate of Falgout*, No. 21953 (29th Judicial Dist. Ct. *filed* July 22, 1980); *Texaco, Inc. v. Estate of Falgout*, No. 21954 (29th Judicial Dist. Ct. *filed* July 22, 1980); *Texaco, Inc. v. Baumgarten*, No. 21955 (29th Judicial Dist. Ct. *filed* July 22, 1980); *Texaco, Inc. v. Estate of Falgout*, No. 21956 (29th Judicial Dist. Ct. *filed* July 22, 1980); *Exxon Corp. v. Roberts*, No. 22016 (29th Judicial Dist. Ct. *filed* Aug. 6, 1980); *Texaco, Inc. v. Lazard*, No. 42382 (17th Judicial Dist. Ct. *filed* July 22, 1980); *Texaco, Inc. v. Estate of Falgout*, No. 42383 (17th Judicial Dist. Ct. *filed* July 22, 1980); *Texaco, Inc. v. Nemours Corp.*, No. 42384 (17th Judicial Dist. Ct. *filed* July 22, 1980).

broad-scale limitation of royalties and undermining of Congress' intent to reconcile intrastate and interstate gas prices—according to whether intrastate gas *was* or *was not* "subject to an existing contract"—should not be undertaken without this Court's review and approval.

In addition to interfering with Congress' plan for reconciling intrastate gas prices with those applicable to interstate sales, the decision of the Louisiana Supreme Court decision also interferes with Congress' express desire in enacting the NGPA to reduce the administrative burden connected with federal natural gas pricing regulation.[12] To this end, Congress sought in the NGPA to establish several statutory categories of natural gas, each with a specified price. Although the description of the gas in each category is complex, Congress at least thought that applying the specified prices to the gas described would be substantially easier than what had been done under the Natural Gas Act.

Section 105 of the NGPA should be no exception to Congress' general desire for administrative clarity. Insofar as natural gas intrastate sales contracts in effect as of the NGPA's enactment in November 1978 were "dedicated," in that they specified the particular fields or wells from which they drew, it is clear that the prices in effect under those contracts apply to that gas—not only under the terms of the original contract (which is true under state law in any event), but also under any later contract for sale of that gas.[13] Expanding the application of § 105

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[12] *See Public Service Comm'n v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 330 (1983); 124 Cong. Rec. S28,633 (1978) (statement of Sen. Jackson).

[13] The NGPA provisions governing "successor" contracts under § 105 and intrastate "rollover" contracts under § 106(b), 15 U.S.C. § 3316(b) (1982), also incorporate contract prices as federal ceiling prices, with adjustments that would operate eventually to harmonize many contract prices with the ceiling price for new interstate gas. *See* Note, *Legislative History of the Natural Gas Policy Act: Title I*, 59 Tex. L. Rev. 101, 120-21 (1980).

beyond such "dedicated" contracts to include "warranty" contracts such as are in issue here, however, not only would unjustly penalize royalty owners, but would also vastly complicate application of § 105. Insofar as producers such as Texaco have sold gas pursuant to such contracts from more than one source, the warranty contract price should theoretically apply to *all* gas sold from those various sources under the Louisiana Supreme Court's new interpretation. The prospect of going back over all warranty contract prices charged since November 1978 to determine the precise source from which all gas was supplied and then tracing through prices subsequently charged for all gas from such sources is directly at odds with Congress' desire for administrative simplicity.

2. The Decision Below is Novel and Directly at Odds with the Views of Those in the Federal Government Responsible for Administering the Natural Gas Policy Act.

The issue whether § 109 or § 105 of the NGPA applies to natural gas sold pursuant to warranty contracts has not been litigated extensively. The issue has arisen, however, before federal agencies that have concluded that, unless a pre-NGPA contract specifically committed a source of gas to be sold, sales under that contract or a successor contract could not be subject to § 105 of the NGPA.

The issue was first addressed and articulated squarely in a formal opinion letter (App. G) issued by the General Counsel of the Federal Energy Regulatory Commission (FERC), the agency charged with administration of the NGPA. The FERC General Counsel was presented with a situation involving the applicability of Section 105 to sales under contracts that existed prior to the enactment of the NGPA and permitted, but did not require, sales from sources subsequently acquired by the seller. In the opinion of the FERC General Counsel, gas sold under

such an "option" provision was not "subject to" a contract on the date of enactment of the NGPA. It therefore was governed by § 109 rather than § 105 of the NGPA.[14]

Precisely the same rationale and conclusion were adopted the following year in the IBLA case cited at p. 8, *supra*, and printed as App. F. That IBLA case involved the same dispute that was litigated subsequently in the *Amoco* case that is now pending on appeal before the Fifth Circuit. The IBLA held—contrary to the opinion of the Louisiana court below—that warranty contract sales do not involve gas "subject to" an existing contract and therefore, the business election made by the producer to sell particular gas under a warranty contract "cannot bind the United States [as royalty owner] to accept a lower royalty than it otherwise would be entitled had Amoco chosen some other source of supply for [its warranty contract customer]." *Amoco Production Co.*, 78 IBLA 93, 99 (Dec. 19, 1983), *aff'd on other grounds*, 627 F.Supp. 1375 (W.D. La. 1986), *appeal docketed*, No. 86-4168 (5th Cir. Mar. 11, 1986) (App. F at 43a).

The views of the foregoing federal officials responsible for administering the NGPA are persuasive evidence, as both the Louisiana trial and intermediate appellate courts found, that § 105 does not govern gas that was not contractually committed for sale prior to the enactment of the NGPA. The decision below of the Louisiana Supreme Court is directly at odds with these executive interpretations and should be reviewed by this Court.

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[14] *See* F.E.R.C. General Counsel Letter Opinion, ¶ 4,972, 1982 Federal Programs Advisory Service (Apr. 8, 1982) (App. G at 48a-49a). That letter opinion followed a letter opinion by a previous FERC General Counsel stating that § 105 would apply to gas that had "actually been produced and sold under" a producer's volume requirements contract, but that dedication of specific sources under an existing contract was necessary for § 105's application to gas sold under a successor contract. *See* F.E.R.C. General Counsel Letter Opinion, ¶ 4,391, 1981 Federal Programs Advisory Service (Feb. 4, 1980) (App. H at 55a-57a).

CONCLUSION

For the foregoing reasons, certiorari should be granted to review the decision below of the Supreme Court of Louisiana.

Respectfully submitted,

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January 5, 1987

APPENDICES

APPENDIX A

[SEAL]

SUPREME COURT
STATE OF LOUISIANA
NEW ORLEANS

September 4, 1986

Chief Justice
John A. Dixon, Jr.
Associate Justices
Pascal F. Calogero, Jr.
Walter F. Marcus, Jr.
James L. Dennis
Jack Crozier Watson
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Ms. Anne E. Tate
Liskow & Lewis
50th Floor, One Shell Square
New Orleans, LA 70139

Re: Louisiana Land and Exploration Co.
vs. Texaco, Inc.
No. 86-C-0131

Dear Counsel:

Enclosed please find a News Release documenting this court's denial of the application for rehearing, in the above entitled referenced case.

This judgment is now final. By copy of this letter we are advising both the trial court and appellate court of the

finality of this case and instructing them to do whatever is necessary to implement the judgment.

With kindest regards, I remain

Very truly yours,

/s/ Frans J. Labranche, Jr.
FRANS J. LABRANCHE, JR.
Clerk of Court

FJLJr:kf
Enclosure
ccs: Hon. Gerald P. Fedoroff
Hon. Dan Foley
Hon. Danielle Schott

SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112

FOR IMMEDIATE NEWS RELEASE NEWS RELEASE # 96

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the 4th day of September 1986, the following action was taken by the Supreme Court of Louisiana in the cases listed below:

REHEARINGS DENIED:

84-B-1217 C/W 85-B-0204	Louisiana State Bar Association vs. Sanford Krasnoff CALOGERO & MARCUS, JJ., would grant a rehearing.
85-B-0765	Louisiana State Bar Association vs. Edward C. Alker
85-K-1520 and 85-K-1521	State of Louisiana vs. Raymond Smith and Earl Smith CALOGERO & WATSON, JJ., would grant the State's application only with respect to Earl Smith.
85-KA-1708	State of Louisiana vs. Jeffrey C. Clark
85-KA-1907	City of Shreveport vs. Sam Restivo
85-KA-2263	State of Louisiana vs. Victor Lindsey
85-C-2402	Arlene LaFleur vs. John Deere Co., et al., C/W Larry Fontenot vs. F. Hollier & Sons, Inc., et al
86-C-0131	Louisiana Land and Exploration Co. vs. Texaco, Inc. CALOGERO, DENNIS & LEMMON, JJ., would grant a rehearing.
86-C-0133	Mary S. Fernandez vs. General Motors Corp., et al DENNIS, J., would grant a rehearing.

APPENDIX B

SUPREME COURT OF LOUISIANA

No. 86-C-0131

THE LOUISIANA LAND AND EXPLORATION COMPANY

v.

TEXACO, INC.

June 23, 1986

Gene Lafitte, George Domas, Anne Tate, Liskow & Lewis, Frederick Veters, Larry Port, Robert E. Plumb, Jr., Patrick J. Butler, James D. Hurley, New Orleans, for applicant.

Charles Marshall, Jr., David Schell, Jr., Milling, Benson, Woodward, Hillyer, Pierson & Miller, P.L.C., New Orleans, for respondent.

WATSON, Justice.

The Louisiana Land and Exploration Company (LL & E), a Maryland corporation, seeks damages from Texaco, Inc., a Delaware corporation, for Texaco's alleged failure to pay proper natural gas royalties from the production on land leased from LL & E.[1]

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[1] LL & E's petition stated four causes of action:

I. First Cause of Action:

A 1928 contract between LL & E, mineral lessor, and Texaco, lessee, obligated Texaco to pay LL & E as royalties on property

Texaco moved for partial summary judgment as to gas being sold under contract on the effective date of the

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in Terrebonne, LaFourche, St. Charles and Jefferson Parishes: "a fair and reasonable price at the wells on ¼ of the gas so used or sold, with due regard to the character of the gas and the purpose for which it is used and the prevailing economic conditions." Under subsequent agreements, LL & E accepted Texaco's procedures for computation of the royalties pending contrary notice to Texaco. On October 15, 1981, LL & E gave written notice to Texaco demanding that the royalties be paid in accordance with the contract. On November 25, 1981, LL & E made demand, for proper payment of royalties under LSA-R.S. 31:137.

II. Second Cause of Action:

As to the "WK & L Lease" from LL & E to Texaco on property in St. Mary Parish, the petition alleges that the gas produced under this lease is processed by Texaco and used to supply its intrastate industrial gas system and is not committed or dedicated by Texaco to any outside purchaser. Texaco is obliged to pay as royalty under this lease one-eighth of the "market price" at the well. As modified by the unitization agreement, Texaco is required to pay a one-eighth royalty of "reasonable value at the point of delivery in the field, which in no event shall be less than the market value at the point of delivery in the field." Texaco has allegedly failed to pay the required royalties and has improperly deducted processing fees and other charges.

III. Third Cause of Action:

The "Paragraph 26 Leases" from LL & E to Texaco on property in the Parishes of Terrebonne, LaFourche, St. John, St. Charles and Jefferson are the subject of this claim. The royalties under these leases are based on "value" which is defined " 'the fair and reasonable value' at the place where used or sold, but in no event less than the highest selling price of gas then currently sold by producers under a contract of sale having a term of three (3) years or more, from any field located in: (i) a five parish area surrounding the leased premises under the Paragraph 26 Leases. . . ."

IV. Fourth Cause of Action:

This involves the "Paragraph 38 Leases" from LL & E to Texaco on property in Terrebonne Parish. The royalties

Natural Gas Policy Act of 1978.[2] Texaco argued that those royalties were controlled by Section 105 of the NGPA [3] and it was legally precluded from collecting a

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claimed under this cause of action are "a fraction of the 'value' at the well of all gas produced and saved or utilized under the lease identified as item (a) of Paragraph 38 above, and a fraction of the 'market value' at the well of gas used or sold under the leases. . . ."

LL & E asked for the royalties which Texaco allegedly failed to pay, plus damages under LSA-R.S. 31:137, et seq. for double the amount of the royalties, together with interest, costs, and attorney's fees.

By supplemental petition, LL & E amended its first cause of action by adding the following paragraph:

"8-A

"The 1928 Contract also obligates Texaco to pay as royalty to LL & E 'an additional 8⅓% of the net profits realized at the mouth of the well' from the total production of gas from each dome described in the 1928 Contract, which net profits are to be based upon the price of gas as determined under subdivision (b) of the Eleventh Article, Paragraph (b) page nine of the 1928 Contract. * * *"

[2] 92 Stat. 3352; 15 U.S.C., § 3301, et seq.

[3] Section 105, 15 U.S.C., § 3315, provides in pertinent part:

"(a) Application.—The maximum lawful price computed under subsection (b) of this section shall apply to any first sale of natural gas delivered during any month in the case of natural gas, sold under any existing contract or any successor to an existing contract, which was not committed or dedicated to interstate commerce on November 8, 1978.

"(b) Maximum lawful price—

"(1) General rule.—Subject to paragraphs (2) and (3), the maximum lawful price under this section shall be the lower of—

"(A) the price under the terms of the existing contract, to which such natural gas was subject on November 9, 1978, as such contract was in effect on such date; or

[Continued]

higher sales price which would reflect actual value. Section 105 applies to intrastate gas "sold under any existing contract." The term "existing contract" is defined as "any contract for the first sale of natural gas in effect on November 8, 1978." [4]

LL & E opposed Texaco's motion for partial summary judgment denying that the NGPA precluded Texaco from paying royalties on the true value of the gas and arguing that Texaco elected to deliver its gas to contract purchasers in lieu of other purchasers.

On cross motion, LL & E received a partial summary judgment against Texaco decreeing Texaco liable for royalties under the LL & E leases on the basis of the prices established under Section 109 of the NGPA.[5] The

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[3] [Continued]

"(B) the maximum lawful price, per million Btu's, computed for such month under section 3312 of this title (relating to new natural gas).

* * * *

"(c) Definition of contract price.—For purposes of this section, the term 'contract price', when used with respect to any specific date, means—

"(1) the price paid, per million Btu's, under a contract for deliveries of natural gas occurring on such date; or

"(2) if no deliveries of natural gas occurred under such contract on such date, the price, per million Btu's, that would have been paid had such deliveries occurred on such date."

[4] 15 U.S.C., § 3301(13).

[5] Section 109, 15 U.S.C., § 3319 provides in pertinent part:

"(a) Application.—The maximum lawful price computed under subsection (b) of this section shall apply to any first sale of any natural gas delivered during any month, in the case of any natural gas which is not covered by any maximum lawful price under any other section of this part, including—

* * * *

"(3) natural gas which was not committed or dedicated to interstate commerce on November 8, 1978, and which was not subject to an existing contract on such day; . . ."

trial court rejected Texaco's argument that the gas was sold under contracts existing when the NGPA was adopted, because the gas was not dedicated to any particular contracts. Since Texaco chose to meet its contractual obligations with LL & E's gas, the trial court held that Section 109 controlled the price.

Texaco appealed and the trial court judgment was affirmed. *The Louisiana Land & Exploration v. Texaco, Inc.*, 478 So.2d 926 (La.App. 4 Cir., 1985). Deciding that Texaco had improperly paid royalties calculated upon the value of the gas under NPGA Section 105 rather than Section 109, the court of appeal remanded for a determination of damages. A writ was granted to consider the court of appeal judgment. 484 So.2d 130 (La., 1986).

In 1978, NGPA extended price controls over intrastate gas sales. *Pennzoil Company v. Federal Energy Regulation Commission*, 645 F.2d 360 (5 Cir., 1981), cert. den. 454 U.S. 1142, 102 S.Ct. 1000, 71 L.Ed.2d 293 (1982); *Energy Reserves Group, Inc. v. Kansas Power & Light Company*, 459 U.S. 400, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983).[6] The two-fold purpose of the statute was: (1) protecting consumers by fixing the price of old or flowing gas; while (2) encouraging production by allowing higher prices for new gas. *Pennzoil*, supra. The regulatory scheme of the NGPA imposed price ceilings on all intrastate gas flowing and being sold under contract when the statute was enacted.[7]

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[6] In the 1970's, a dramatic disparity developed between the unregulated price of intrastate gas and the lower price of federally regulated interstate gas. *Shell Oil Company v. Williams, Inc.*, 428 So.2d 798 (La., 1983).

[7] However, Section 105 does allow contractual price escalation clauses to continue in operation until the contract price reaches the lawful ceiling. *Energy Reserves Group, Inc., supra*; *Pennzoil*, supra.

Under Section 105, the maximum lawful price for first sales of natural gas under an existing intrastate contract or any successor to an existing intrastate contract depends upon the contract price in effect on the day before enactment of the NGPA. In 1978 U.S.Cong. & Ad. News 8800, 8999, Section 105 of the NGPA is discussed as follows:

> "The conference agreement establishes a maximum lawful price for first sales of natural gas under an existing intrastate contract or any successor to an existing intrastate contract. The maximum lawful price depends upon the contract price in effect on the date of enactment of this Act. * * *"

There is no question that these were first sales;[8] that Texaco's were "existing" contracts;[9] and that the gas was intrastate rather than interstate.

Texaco's contracts were warranty rather than dedication contracts. However, *Amoco Production Company v. Hodel*, 627 F.Supp. 1375 (W.D.La., 1986) holds that Congress clearly did not intend to distinguish between warranty and dedication contracts in establishing the price ceilings of Section 105. *Hodel's* interpretation is in accord with the statutory purposes of the NGPA.

ECEE, Inc. v. Federal Energy Regulatory Commission, 645 F.2d 339 (5 Cir., 1981) notes that Section 109 is: "a catchall category—gas that somehow falls between the cracks of the elaborate pricing scheme in sections 102 through 108 will receive some price. It is thus a pricing provision of last resort." Section 109 states that it only applies to gas "which is not covered by any maximum lawful price under any other section of this part."[10] Thus, Section 109 is only applicable when no other sec-

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[8] See the definition in 15 U.S.C., § 3301(21).

[9] See the definition in 15 U.S.C., § 3301(13).

[10] 15 U.S.C. § 3319.

tion of the NGPA applies. Section 105 has precedence over Section 109. *ECEE* supra.

LL & E's gas was "sold under" existing contracts.[11] The "Application" of Section 105 is governed by that term. Section 105(b) speaks of "the existing contract, to which such natural gas was subject", but, the term is used solely with respect to the "maximum lawful price" of old natural gas as distinguished from new natural gas. The statute indicates that all old gas in production would be the subject of a contract. Being "sold under" existing contracts, LL & E's gas is governed by the maximum lawful price in Section 105.[12]

The apparent inequity of calculating LL & E's royalties under the contract prices negotiated by Texaco does not result from any unreasonable action by Texaco. See *Henry v. Ballard & Cordell Corporation*, 418 So.2d 1334 (La., 1982). "[T]he parties are operating in a heavily regulated industry." *Energy Reserves Group, Inc. v. Kansas Power & Light Company*, 459 U.S. 400 at 413, 103 S.Ct. 697 at 705, 74 L.Ed.2d 569 at 582 (1983). See *Shell Oil Company v. Williams, Inc.*, 428 So.2d 798 (La., 1983).

The lower courts erred in granting LL & E's motion for partial summary judgment.[13] Texaco is entitled to

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[11] Section 105(a), 15 U.S.C., § 3315(a).

[12] Even if the language of Section 105 were not controlling, the term "subject to" in Section 109 is not synonymous with "dedicated to".

[13] The initial contrary recommendation by Commissioner Holahan was correct. He noted that: "prior to the enactment of the NGPA Texaco remitted to LL & E based upon the prices it received on its sale of the gas to its Mississippi corridor customers. This method of computation for payment was accepted by LL & E when the NGPA was enacted. While LL & E's acceptance of such method was conditioned until such time as it might choose to challenge the method, i.e., the pipeline produced prices fix the market for 'market rate' purposes, there is no question that such conditioned acceptance was in effect on the date of the applicability of the NGPA and,

partial summary judgment decreeing that its royalty payments to LL & E on gas flowing and sold under contract as of November 8, 1978, are controlled by Section 105 of the NGPA.[14] Whether Texaco has correctly paid the royalties due under Section 105 of the NGPA, "has improperly deducted . . . processing fees and other charges", and has properly paid any other royalties, remain as factual issues to be resolved at trial on the merits.

IT IS ORDERED, ADJUDGED, AND DECREED that Texaco, Inc.'s royalty obligations under the subject leases to The Louisiana Land & Exploration Company on gas flowing and sold under contract as of November 8, 1978, are controlled by Section 105 of the Natural Gas Policy Act of 1978.[15]

The judgment of the court of appeal is reversed, and the matter is remanded for trial on the merits.

REVERSED AND REMANDED.

LEMMON, J., dissents.

DENNIS, J., dissents with reasons.

CALOGERO, J., dissents and assigns reasons.

CALOGERO, Justice, dissenting.

I would affirm the judgments of the district court and the court of appeal in this case. Those courts were cor-

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accordingly, that price on that day became the appropriately adopted Section 105 fixed price."

[14] This is not precisely the decree requested in Texaco's motion for partial summary judgment, but it is "just, legal and proper." LSA-C.C.P. art. 2164. It resolves the primary issue affecting Texaco's liability. LSA-C.C.P. art. 966 C. The parties agree that the substantive legal issue in the case is whether Texaco's liability is governed by Section 105 or Section 109 of the NGPA.

[15] 15 U.S.C. § 3315.

rect in concluding that Section 109 rather than Section 105 of the National Gas Policy Act applies.

Section 105 provides that the maximum lawful price, computed under subsection B of Section 105, shall apply, pertinently, to natural gas sold under any existing contract. The "existing contract[s]" to which the statutory language in this case applies are the contracts Texaco entered into with its industrial customers ("first sale" is defined, pertinent to this case, in 15 U.S.C. § 3301(21)(A), as "any sale of any volume of natural gas—(iii) to any person for use by such person."). Those are the contracts for which Section 105's maximum lawful price are applicable. Section 105, by its terms, does not apply to Texaco's contracts, or leases, with LL & E, nor to such gas as Texaco has at its disposal by virtue of those independent leases with LL & E.

The only provision of Section 105 which might be read to tie the Texaco-LL & E leases to the Section 105 price limitation is Section 105(b)(1)(A), regarding the Section 105 maximum lawful price, wherein that maximum lawful price is stated to be, with a minor qualification, "the price under the terms of the existing contract [reference here is to the 'first sale' contracts Texaco has with its industrial customers], to which such natural gas was subject on November 9, 1978 . . ." Were Texaco's LL & E gas *subject to* the contract entered into between Texaco and its industrial customers, then the Section 105 price limitation would be applicable to the sale by Texaco to its industrial customers, and correspondingly the value of LL & E's gas would be, at most, the price Texaco would be permitted by Federal regulation to receive in the sales to its industrial customers. LL & E's gas, however, was not subject to the contracts which Texaco entered into years earlier with its industrial customers, because that gas was not "dedicated" to the Texaco contracts with its industrial customers. The latter contracts simply committed Texaco to provide unidentified but

stated quantities of natural gas. These were warranty contracts, not dedication contracts.

The construction of the pertinent provisions of the Natural Gas Policy Act of 1978 by both the Civil District Court for the Parish of Orleans and the Louisiana Fourth Circuit Court of Appeal, which essentially comports with that contained in the preceding paragraph, surely came as no surprise to Texaco, for that construction is consistent with the opinion expressed by general counsel for the Federal Energy Regulatory Commission, the federal agency charged with administering the Natural Gas Policy Act. In a letter to Tipperary Corporation dated April 18, 1982, (Paragraph 4972, 1982 Federal Program Advisory Service), general counsel for FERC expressed the opinion that Section 105 is applicable to "the price under the terms of the *existing contract to which such natural gas was subject* on the date of enactment of this Act, . . ." He expressed the view that Congress intended Section 105 to apply only to gas that was *subject to* an existing intrastate contract on the date of enactment. He went on to recite that "an existing contract cannot be amended to include gas that was not subject to the contract on date of enactment, *otherwise producers could rearrange their contractual obligations in an area to funnel all gas production through the most beneficial contract in the area.* Such a process would violate the congressional policy expressed in Section 105 to hold intrastate sellers of flowing gas to bargains reached before the date of enactment."

The majority relies heavily upon *Amoco Production Co. v. Hodell*, 627 F.Supp. 1375 (W.D.La.1986). That United States District Court decision, is, under its holding, not dispositive of the issue before us, for in that case ongoing production from uncommitted gas reserves was not involved, as it is here. Rather, what was involved was a prior two year period (1977-79) of delivered gas. And the United States District Court judge's determination

that the price ceilings of Section 105 apply to Amoco's gas under contest in that case was not dispositive of the controversy, for the judge went on to rule in favor of Amoco's opponent, the United States government, concluding that the initial royalty evaluation by the United States Department of the Interior was proper, and was not invalidated by the later imposition of NGPA price ceilings. Furthermore, and most specifically *Amoco Production Co. v. Hodell* is currently pending on appeal in the United States Fifth Circuit Court of Appeal, No. 86-4168.

In my view, Texaco, which made non-beneficial long term gas supply contracts with intrastate industrial users, is not entitled to saddle LL & E with Federal statutory price limits, having contracted to pay LL & E the "value" of its gas. Surely they may not do so by *their* simply determining to continue supplying their industrial customers with LL & E gas, and without a valid argument that Section 105 of the Natural Gas Policy Act is applicable here.

DENNIS, Justice, dissenting.

Although I agree basically with the statutory construction, I cannot agree that summary judgment should be granted solely on an abstract legal question.

APPENDIX C

COURT OF APPEAL OF LOUISIANA
FOURTH CIRCUIT

No. CA-3146

THE LOUISIANA LAND AND EXPLORATION COMPANY

v.

TEXACO, INC.

Oct. 23, 1985

Rehearing Denied Dec. 20, 1985

Milling, Benson, Woodward, Hillyer, Pierson & Miller, Charles D. Marshall, Jr., Appeal Counsel, David N. Schell, Jr., New Orleans, for plaintiff-appellee Louisiana Land and Exploration Co.

Gene W. Lafitte, Appeal Counsel, George J. Domas, Anne E. Tate, Liskow & Lewis, and Frederick W. Veters, Patrick J. Butler, Larry N. Port, Robert E. Plumb, Jr., James D. Hurley, Texaco Inc., New Orleans, for defendant-appellant Texaco, Inc.

Before SCHOTT, KLEES and BYRNES, JJ.

KLEES, Judge.

This appeal stems from the granting of a motion for partial summary judgment in favor of the Louisiana Land and Exploration Company (LL & E). LL & E, which leases certain lands to Texaco for the production

of gas, brought suit against Texaco claiming Texaco had failed to pay proper royalties under the leases. Texaco answered LL & E's petition for damages by denying that its royalty payments were improper, and subsequently filed a motion for partial summary judgment seeking a declaration that its payments were proper at least with respect to the gas it had produced from wells drilled prior to the enactment in 1978 of the Natural Gas Policy Act (NGPA), 15 U.S.C. § 3301 *et seq.* In response, LL & E filed a cross motion for partial summary judgment to declare these payments improper, which was eventually granted by the district court.

The eleven leases involved here generally call for royalty payments based on the value of the gas produced. The primary issue on appeal is whether that value should be determined under Section 105 of the NGPA, as Texaco argues, or under the higher ceiling price reflected in Section 109 of the NGPA, as LL & E claims. We agree with the district court that Section 109 applies. A second issue is whether the partial summary judgment was procedually appropriate in this situation. We find that it was appropriate, and therefore affirm the ruling of the district court.

The problem in this case arose because Texaco, in an effort to secure a market for natural gas when it was not a particularly valuable commodity, entered into long term sales agreements with Louisiana industrial consumers promising future delivery of gas at what are now below-market prices. There are generally two types of marketing contracts for the sale of gas.

A "warranty" contract is an arrangement whereby the producer is obligated to deliver to the purchaser certain quantities of gas; the source of the gas is unspecified and the producer may therefore fulfill his obligation from any source he chooses. This type of contract differs from the so-called "dedication" contract, whereby the producer contracts with a customer agreeing to furnish all the gas

produced from specified reserves, thus "dedicating" those reserves to the particular customer. All the gas involved in this dispute is being used by Texaco to service warranty contracts Texaco entered into with intrastate industrial consumers prior to 1978, when the NGPA was enacted.

The LL & E leases require Texaco to pay royalties based upon a percentage of the value of the gas produced. The Louisiana Supreme Court has already held that the value of natural gas upon which royalty is owed may not exceed the price to which sale of that gas is limited by federal regulation. *Shell Oil Co. v. Williams*, 428 So.2d 798 (La.1983). In determining this price, Texaco claims that Section 105 of the NGPA, entitled "Ceiling price for sales under existing intrastate contracts," is applicable. This section provides, in pertinent part:

> (a) *Application*—The maximum lawful price computed under subsection (b) of this section shall apply to any first sale of natural gas delivered during any month in the case of natural gas, sold under any existing contract or any successor to an existing contract, which was not committed or dedicated to interstate commerce on November 8, 1978.
>
> (b) *Maximum lawful price*—
>
> (1) General rule.—Subject to paragraphs (2) and (3), the maximum lawful price under this section shall be . . .
>
> (A) the price under the terms of the existing contract, to which such natural gas was subject on November 9, 1978, as such contract was in effect on such date . . .

15 U.S.C.A. § 3315

Relying on this Section, Texaco has been paying royalties to LL & E based upon the contract prices specified by the warranty contracts which Texaco has been servic-

ing with the LL & E gas. LL & E's position is that Section 105 does not determine the ceiling price for this gas because the gas is not "subject to" any contract; instead, the LL & E gas is being used to fulfill these particular contracts solely because Texaco has chosen to use it rather than to use gas from other reserves. According to LL & E, the ceiling price for the gas is fixed by Section 109 of the NGPA, which provides, in pertinent part:

> *Ceiling price for other categories of natural gas*
>
> (a) Application—The maximum lawful price computed under subsection (b) of this section shall apply to any first sale of any natural gas delivered during any month, in the case of any natural gas which is not covered by any maximum lawful price under any other section of this part, including—
>
> . . . . .
>
> (3) natural gas which was not committed or dedicated to interstate commerce on November 8, 1978, and which was not subject to an existing contract on such day. . . .

15 U.S.C.A. § 3319.

In granting LL & E's motion, the district court found that although the gas was being "sold under" contracts existing when the NGPA was adopted, as is required by subsection (a) of Section 105, this fact was not enough to submit the gas to the Section 105 price limitation. According to the lower court, subsection (a) must be read *in para materia* with subsection (b) of Section 105 and subsection (a)(3) of Section 109, both of which refer to gas that is "subject to" or "not subject to" an existing contract. The court found that because of the flexibility of the warranty contracts, even though the gas may have been economically committed to these customers, it was not "subject to" any contract, and therefore was governed by Section 109 rather than Section 105.

After reviewing the law and the facts, we find that the district court was correct in its determination. Texaco's argument is based upon isolating the term "sold under" in subsection (a) of Section 105, rather than reading the Section as a whole to determine its meaning. We find that the use of the term "subject to" in subsection (b), (and again in Section 109) necessarily qualifies the more general language "sold under". *Cf. Tenneco Exploration, Ltd. v. Federal Energy Regulatory Commission,* wherein the federal Fifth Circuit read NGPA Section 104 *in para materia* with Section 109 to determine the applicability of Section 109 to gas that had not been commited or dedicated to interstate commerce within the meaning of the NGPA.)

The term "subject to," in its ordinary sense, means "subordinate to" or "governed or affected by". *See Black's Law Dictionary* 1278 (5th Ed. 1979). There is no question that there are no particular gas reserves governed by warranty contracts entered into by Texaco. It was solely Texaco's choice to meet its obligations to these customers with LL & E's gas. Under the circumstances, we cannot say that the gas in question was subject to an existing contract at the time of the NGPA's enactment.

Our conclusion is buttressed by the fact that all the existing authority on this point, although persuasive rather than authoritative, has interpreted the phrase "subject to" in Section 105 as requiring that a source of gas be described in a contract in order to trigger the Section's application. *See: In the Matter of Amoco Production Co.*, 78 IBLA 93 (1983) (A decision by the Interior Board of Land Appeals with appeal currently pending in the federal district court, western district of La., docket #CV84-0916); Letter opinion by Charles A. Moore, general counsel of the Federal Energy Regulatory Commission, addressed to Tipperary Corp., 1982 Federal Program Advisory Service, p. 3, para. 972.) Therefore,

we hold that the district court correctly concluded that Section 109 of the NGPA regulates the ceiling price for the gas in question.

Texaco additionally contends that partial summary judgment was procedurally improper in this case both because the decision did not determine any portion of its liability to LL & E and because there are issues of disputed fact that prevent summary judgment. We disagree.

The district court's decision is a proper partial summary judgment under Louisiana Code of Civil Procedure article 966(C), which provides that summary judgment "may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages." In this case, the district court determined that Texaco is liable to LL & E for paying royalties calculated upon the value of the gas as determined under the Section 105 contract price rather than the Section 109 ceiling price. The extent of the damages, if any, suffered by LL & E must be determined in a further proceeding. No damages have yet been proven, and indeed, the partial summary judgment would be proper even if none are ever established. *See, e.g. CBM Engineers, Inc. v. Transcontinental Insurance Co.*, 460 So.2d 745 (La.App. 3rd Cir. 1984), wherein the court approved the procedure of granting a partial summary judgment on the issue of an insurer's obligation to defend, reserving to the insured the right to establish damages in a further proceeding. We reject LL & E's contention that it has proven by affidavit that the gas could at all times have been sold at the Section 109 ceiling price, thereby establishing its value for royalty purposes under the leases. Instead, we find that the value of the gas within the terms of the leases is a disputed factual issue to be determined at the hearing on damages.

As for the other genuine issues of fact which Texaco claims should prevent summary judgment herein, we find

that they also relate solely to damages rather than to liability. Accordingly, we affirm the partial summary judgment granted by the district court and remand the case for a determination of damages.

AFFIRMED AND REMANDED.

APPENDIX D

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA
DIVISION 'E'

No. 82-11785 Docket #4

THE LOUISIANA LAND AND EXPLORATION COMPANY

versus

TEXACO INC.

JUDGMENT

For written reasons assigned,

Louisiana Land and Exploration Company's exception to the Report of the Commissioner is sustained and Judgment is rendered granting Louisiana Land and Exploration Company's motion for partial summary judgment recognizing that the price of the gas produced under the Leases at issue herein are subject to Section 109 rather than Section 105 of the Natural Gas Policy Act of 1978.

JUDGMENT READ RENDERED AND SIGNED this 5th day of October, 1984.

/s/ Gerald P. Fedoroff
Judge

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA
DIVISION 'E'

No. 82-11785 Docket #4

THE LOUISIANA LAND AND EXPLORATION COMPANY

versus

TEXACO INC.

REASONS FOR JUDGMENT

Louisiana Land and Exploration sues Texaco claiming it has been paying less royalty than is due. The LL & E leases to Texaco in question here generally call for royalties based on the value of the gas taken, without particular concern as to the price Texaco actually received for the gas. Of course, the extent to which this gas is price fixed by the Natural Gas Policy Act, determines its value for the purpose of royalty computation. *Shell Oil Co. v Williams* 428 So.2d 798 (La.1983). Texaco contends the value is determined by the price limitation of Section 105 of the Natural Gas Policy Act (15 U.S.C.3315). LL & E argues that the value should be determined under the higher price allowed by Section 109 (15 U.S.C. 3319).

The problem arises because Texaco, in an effort to secure a market for natural gas when it was not a particularly valuable commodity, entered into long term sales agreements with Louisiana industrial consumers promising future delivery of gas at what are now below market prices. There are generally two types of marketing contracts for the sale of gas. Under the more customary arrangement a producer contracts with a customer agreeing to furnish all the gas produced from specified reserves. Under the warranty sales agreement, the producer guarantees to deliver certain quantities of gas to

the customer, and is bound to deliver that amount from whatever source it can. The LL & E leases involved in this dispute are being used by Texaco and were being so used the day before the enactment of the N.G.P.A., to service sales agreements with intrastate industrial consumers. All of these sales contracts are of the warranty type.

Texaco argues that this gas was being "sold under" contracts existing when the Act was adopted. This is true, but that alone does not submit this gas to the Section 105 limitation of price. Section (a) "Application", must be read not only in para materiae with the following subsection (b) (1) (A) but also with section 109(a) (3) both of which refer to gas "subject to" (or "not subject to") an existing contract on the effective date of the act. While this gas was being "sold under" an existing contract, and while because of the expense required to reroute the pipeline system this gas may have been economically committed to these customers, the fact remains that because of the flexibility of these warranty sales agreements, this gas was not "subject to" any contract. As observed by Charles Moore in his opinion of April 8, 1982 (which I treat as persuasive rather than authoritative) whether particular gas is "subject to" a contract is a matter of interpretation under State law. Here there is no doubt that the warranty contracts commit no particular gas to Texaco's customers. It was solely Texaco's choice to meet its obligations to these customers with LL & E's gas. It follows that Section 102 regulates the price at which this gas could be sold.

LL & E's exception to the Commissioner's report is sustained, and its cross motion for partial Summary judgment is granted under C.C.P. 966(c).

NEW ORLEANS LOUISIANA, this 5th day of October, 1984.

/s/ Gerald P. Fedoroff
Judge

APPENDIX E

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA
DIVISION 'E'

No. 82-11785 Docket #4

THE LOUISIANA LAND AND EXPLORATION COMPANY

versus

TEXACO INC.

REPORT OF THE COMMISSIONER

and

JUDGE AND [sic] HOC

STATEMENT OF THE CASE

L.L. & E. filed suit July 29, 1982 which seeks from the Court a finding that a breach of the price stipulations exists in the various lease agreements between L.L. & E. and Texaco, Inc. and only asks that its interpretation of the price provisions be accepted as part of the lease agreements.

In addition it seeks other statutory relief, double the price for failure to pay and attorney fees, as per authority of R. S. 31:139 et seq. L.L. & E. does not seek a cancellation of any of the leases involved.

An exception to the value filed by Texaco, Inc. was argued and overruled. Requests for Supervisory Writs directed to the Court of Appeal, Fourth Circuit, were

denied. Other exceptions filed apparently have been abandoned.

Answer was filed by Texaco, Inc. denying any breach and averring proper payment.

A Supplemental and Amended Petition was filed by L.L. & E. seeking additional damages in accordance with other clauses of one of the leases.

Answer to this was filed by Texaco denying and averring proper payment as in original answer.

The matter is now before the Court on Motions for Pretrial Summary Judgment filed by both parties.

THE ISSUES AND OPINION

The issue to be decided at this time is whether or not the price provisions of the various leases are governed by the Natural Gas Policy Act (150 SC, § 3301, et seq.) [sic] and whether such is to be regulated under Section 105(b)(1) of such act, or some other section of the act. Texaco has made payments applying Section 105 (b)(1) which it argues resolves the lease payment provisions.

All facts in regard to the quantity and quality of the gas actually delivered are not in dispute, and the only issue remaining is the question of the applicability of the N.G.P.A.

All of the gas marketed under the leases herein is sold through an intrastate pipeline owned by Texaco and servicing mainly industries along the Mississippi River corridor. Until the enactment of the NGPA in 1978 Congress had not enacted any legislation which had the direct effect of regulating the price structure of gas marketed intrastate. Interstate gas had been so regulated for many years prior to this.

The effect of this legislation closed the door on any price issues related to the inter and intrastate systems of marketing gas, and now all gas sold falls under the

provisions of the NGPA, and must perforce fall under one of its applicable provisions.

An examination of the act as it applies to the subject facts clearly manifests the application of Section 105 of the act, and no other section.

The Natural Gas Policy Act was enacted by Congress on November 9, 1978, and for the first time extended federal price regulation to the intrastate gas market. Title I of the NGPA established maximum lawful prices or well pricing categories for "first sales of both interstate and intrastate gas. Higher maximum lawful price ceilings were established for "new gas", as opposed to "old" or "flowing" gas (i.e., gas produced from wells flowing to gas contracts in effect on November 8, 1978, and not qualifying as new gas (NGPA Section 102), new onshore well gas (NGPA Section 103), deregulated gas (NGPA Section 107), or stripper well gas (NGPA Section 108), in an effort to provide incentives for exploration and production of new reserves. *Pennzoil Co. v. Federal Energy Regulatory Commission*, ¢$% F.2d 360, 367 and 372 (5th Cir. 1981) [sic]. For "old" or "flowing" gas, Congress sought to maintain existing gas prices by establishing maximum lawful prices or well pricing categories that adopted or incorporated gas prices in effect immediately prior to the NGPA's enactment. *Pennzoil Co. v. Federal Energy Regulatory Commission, supra* at 372.

With this legislative background in mind, it is apparent that Congress designed NGPA Section 105 to cover intrastate gas flowing to gas contracts in effect at the time of the NGPA's enactment. Section 105(a), 105(b)(1), and 105(b)(2) provide as follows:

> (a) *Application.* The maximum lawful price computed under subsection (b) of this section shall apply to any *first sale* of natural gas delivered during any month in the case of natural gas, *sold under any existing contract* or any suc-

cesssor to an existing contract, which was *not committed or dedicated to interstate commerce* on November 8, 1978.

(b) *Maximum lawful price.*

(1) *General rule.* Subject to paragraphs (2) and (3), the maximum lawful price under this section shall be the lower of—

(A) the price under the terms of the existing contract, to which such nautral gas was subject on November 9, 1978, as such contract was in effect on such date; or

(B) the maximum lawful price, per million Btu's, computed for such month under section 3312 of this title (relating to new natural gas).

(2) *Contract price exceeding new gas ceiling price on November 9, 1978.* In the case of any natural gas described in subsection (a) of this section for which the contract price applicable on November 9, 1978, exceeds the maximum lawful price, per million Btu's, computed for such date under section 3312 of this title (relating to new natural gas), the maximum lawful price under this section shall be the higher of—

(A) the maximum lawful price, per million Btu's, computed for such month under section 3312 of this title; or

(B) (i) the contract price on November 9, 1978, in the case of November 1978; and

(ii) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this subparagraph for the preceding month multiplied by the monthly equivalent of

the annual inflation adjustment factor applicable for such month.

At this point it is appropriate to note that prior to the enactment of the NGPA Texaco remitted to L.L. & E. based upon the prices it received on its sale of the gas to its Mississippi corridor customers. This method of computation was accepted by L.L. & E. when the NGPA was enacted. While L.L. & E.'s acceptance of such method was conditioned until such time as it might choose to challenge the method, i.e., the pipeline produced prices fix the market for "market rate" purposes, there is no question that such conditioned acceptance was in effect on the date of the applicability of the NGPA and, accordingly, that price on that day became the appropriately adopted Section 105 fixed price.

A reading of the act reveals that it was the intention of Congress to fix the price of "old" or "flowing" gas which had been utilized at its then existing price, and that relief from such price structure would only come from newly discovered sources or renewed or reworked reserves. While the act attempts its regulatory feature through various fact situations, "new" gas, gas found on land, "stripper" gas, etc., in the instant case, none of these sometimes abstract identification systems are at issue. There is no question that the gas here involved is "old" or "flowing" gas.

L.L. & E.'s main argument is not as to the facts, it is directed to the legal issue of the applicability of the various sections of the act. Its argument never gains the purchase necessary to escape the lower tier price fixed by the NGPA.

The effect of the enactment, will, unquestionably, enhance the fortunes of Texaco, Inc. from its pipeline operations. However, the economics of the effects of legislation are an inappropriate foundation for an argument against the applicability of such legislation, which, for its very purpose aims at the economics of the system.

In an earlier paragraph it was noted that the quality and quantity of the gas involved herein is not in dispute. There are allegations with respect to certain delivery charges imposed which remain at issue. The resolution of these matters do not affect the applicability of the NGPA, however, and the ruling at this time should be so limited.

In conclusion, an examination of the annexed affidavits fail to reveal any factual dispute which would affect the applicability of the NGPA. Included as factual affidavits on both sides of the issue are opinions of former Department of Energy officials with respect to the applicability of the NGPA. As previously noted, such applicability is a matter of law, and such affidavits have been disregarded for this reason and for the reason that the affidavits do not reveal any personal connection bearing on the facts of this case.

A proposed judgment sustaining the Motion for Summary Judgment filed by Texaco, Inc. and dismissing the one filed by L.L. & E. is annexed.

New Orleans, Louisiana August 27th, 1984

/s/ John M. Holahan
JOHN M. HOLOHAN
Commissioner and Judge Ad Hoc

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

DIVISION "E"

No. 82-11785 Docket No. 4

THE LOUISIANA LAND AND EXPLORATION COMPANY

vs.

TEXACO, INC.

JUDGMENT

This matter came before the Court on a Motion for Summary Judgment on recommendation of the Commissioner and Judge ad Hoc.

Consequently such,

IT IS ORDERED, ADJUDGED AND DECREED that the Motion for Summary Judgment filed by Texaco, Inc. be granted and that the lease payment provisions of the leases described in the original and amended petitions filed herein be, and hereby are, recognized as superimposed by the provisions of the Natural Gas Policy Act, Section 105 (b) (1) and so governed by such Act.

IT IS FURTHER ORDERED that all other issues raised in the original and amended petition filed by L.L. & E. remain in full force and effect.

IT IS FURTHER ORDERED that the Motion for Summary Judgment filed by L.L. & E. be dismissed.

New Orleans, Louisiana ————, 1984

Judge

APPENDIX F

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
4015 Wilson Boulevard
Arlington, Virginia 22203

AMOCO PRODUCTION CO.

IBLA 83-681 Decided December 19, 1983

An appeal of a decision by the Director, Minerals Management Service, denying a protest against a determination that royalty for certain gas produced from oil and gas lease OCS-G 2866 was underpaid, and a later assessment of a late payment charge.

Affirmed.

1. Oil and Gas Leases: Royalties—Outer Continental Shelf Lands Act: Oil and Gas Leases.

> The United States, as lessor of an oil and gas lease, is entitled to its royalty based on "the reasonable value" of the gas as set by the Secretary. Where a party challenges a determination as to the value of gas produced, the party must establish that the methodology used in the Government's computation is, in fact, erroneous.

2. Laches—Outer Continental Shelf Lands Act: Oil and Gas Leases—Payments: Generally

> 30 CFR 250.49 authorizes Minerals Management Service to impose a late payment interest charge where royalty payments for offshore oil and gas leases are untimely or improper. The authority of the United States to enforce a public right or to

protect a public interest is not vitiated or lost by acquiescence of its officers or by their laches, neglect of duty, failure to act, or delays in the performance of their duties.

APPEARANCES: William M. Meyers, Esq., George J. Domas, Esq., Deborah Bahn Price, Esq., New Orleans, Louisiana, for Amoco Production Company; Charles R. Shockey, Esq., Department of the Interior, Office of the Solicitor, Washington, D.C., for Minerals Management Service.

OPINION BY
ADMINISTRATIVE JUDGE STUEBING

Amoco Production Company (Amoco) appeals the April 4, 1983, decision of the Director, Minerals Management Service (MMS), denying its protest against a July 20, 1982, determination that it underpaid its royalty obligation by $10,424,298.62 for gas produced from oil and gas lease OCS-G 2866 between February 1977 through December 1979 and sold to Florida Power and Light (FP&L) and a September 17, 1982, determination that Amoco was liable for late payment assessments in the amount of $3,920,015.52.

Lease OCS-G 2866 was issued effective December 1, 1974, under the authority of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1301-1343 (1970), for all of Block 23, Vermilion area, Offshore Louisiana (map No. 3), constituting approximately 5,000 acres. The lease required the lessee to "pay the lessor a royalty of 16⅔ percent in amount or value of production saved, removed, or sold from the leased area." Since commencement of production under the lease, Amoco has sold its share of the natural gas produced to Florida Gas Transmission (FGT) and FP&L under a contract executed in 1965.[1] On February 1, 1977, Geological Survey (Sur-

[1] Amoco is a 33.33333 percent shareholder in OSC-G 2866. The contract with FP&L was cancelled by its terms in Jan. 1967, but was reinstated, aa [sic] modified, on Aug. 4, 1967.

vey), predecessor to MMS in functions concerning offshore mineral lease management, advised Amoco that royalty value for gas sold to FP&L was to be based on "well spud dates pursuant to Federal Power Commission [(FPC)] Opinion No. 770-A."[2] Effective December 1, 1978, Opinion No. 770-A prices were incorporated in section 104 of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. § 3314 (Supp. V 1982).[3]

After a review of Amoco's royalty computations submitted for the period February 1974 through December 1979, MMS issued a determination dated July 20 1982, stating as follows:

> Our review shows that for the period of February 1977 through February 1979, Amoco valued its share of natural gas from the referenced lease at the Florida Gas Transmission (FGT) contract price of $.2125 per MCF. However, Amoco was shipping a portion of its share of the natural gas to Florida Power and Light Company (FP&L). For the period of March 1979 through December 1979, Amoco in-

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[2] The value for gas sold to FP&L was to be calculated pursuant to FPC Opinion No. 770-A as follows: (15.025/14.73) [Base Price (BTU determination/1000) + gathering allowance + transportation allowance].

[3] The maximum lawful price under this section for any month was to be the higher of:

"(A) (i) the just and reasonable rate, per million Btu's, established by the Commission which was (or would have been) applicable to the first sale of such natural gas on April 20, 1977, in the case of April 1977; and

(ii) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this subparagraph for the preceeding month multiplied by the monthly equivalent of the annual inflation adjustment factor applicable for such month, or

(B) any just and reasonable rate which was established by the Commission after April 27, 1977, and before November 9, 1978, and which is applicable to such natural gas."

cluded only a portion of the natural gas shipped to FP&L at NGPA, Section 104, Post 1974 prices in their computation of MMS royalties. Amoco's computation of MMS royalties for shipments made to FP&L are not in accordance with the MMS value determination letter to Amoco, dated February 1, 1977 (see attached). This letter established the fair market value to be a rate that would be received based upon well spud dates pursuant to FPC Opinion No. 770-A. (Title 30 CFR 250.64).

During September through December 1979, Amoco computed MMS royalties based upon calculated volumes, which deleted gas volumes bypassed around the gas processing plant. Additionally, when Amoco computed MMS royalties based upon residue and natural gas liquid products, residue gas used as dehydration station fuel was not included in the royalty computation. Gas used as fuel for gas treatment functions should be included in the computation of royalties due MMS.

MMS concluded that the royalty payments for the period in question were deficient by $10,424,298.62,[4] and informed Amoco that late payment charges would be assessed pursuant to 30 CFR 250.49.

Amoco appealed to the Director, MMS, arguing that production value should be based on the proceeds received under the contract for sale to FP&L and that MMS failed to adequately consider the regulatory effect of NGPA in making its decision. Meanwhile, MMS issued a late pay-

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[4] With regard to the gas shipped to FP&L during the period Feb. 1977 through Nov. 1978, the additional royalties demanded were based on the rate approved by FPC Opinion No. 770-A with respect to Vintage III gas.

As to gas shipments to FP&L during the period Dec. 1978 through Dec. 1979, royalties were recomputed with reference to well spud dates on the basis of the NGPA section 104 post-1974 prices.

ment assessment of $3,920,015.52, which Amoco protested as premature and inequitable.[5]

The Director, MMS, affirmed the July 20, 1982, determination in an April 4, 1983, decision because the FP&L contract "merely was a warranty contract," and thus Amoco was "free to sell the gas in question to a third party at the FPC Opinion No. 770-A vintage III prices and later at the NGPA Section 104 post-1974 prices." Moreover, the Director declared that Amoco was precluded from challenging the production values established by the February 1, 1977, value determination letter because it had failed to timely appeal that action.

Amoco has, in turn, appealed to this Board pursuant to 30 CFR 290.7, asserting that the Director's decision was erroneous in the following conclusions: (1) All relevant factors listed in 30 CFR 250.64 regarding royalty valuation were considered and adequately explained; (2) the FP&L contract price was not the maximum price under NGPA; and (3) Amoco could sell gas from OCS-G 2866 to third parties and still satisfy its contractual warranty obligations to FP&L with gas from other sources. In regard to the late payment charges, Amoco argues that assessment of such charges is premature, as no final adjudication has been made that Amoco is liable, and that it is inequitable for MMS to assess a charge for the late payment.

[1] The Secretary of the Interior is authorized to lease tracts of the Outer Continental Shelf under OCSLA for the exploration and development of mineral resources, including oil and gas. In passing the Act, Congress committed the Government to the goal of obtaining fair market value for Outer Continental Shelf (offshore) oil and gas resources. *Watt* v. *Energy Action Educational*

[5] The amount assessed was determined after Amoco's payment of deficient royalty was received on Aug. 20, 1982.

Foundation, 454 U.S. 151, 162 (1981).[6] Computing the royalties payable for offshore gas production involves: (1) A determination of the amount of production on which royalties are to be paid; (2) a determination of the value of the gas produced; (3) a determination of the deductions to be allowed; and (4) application of the rate of royalty provided for in the lease.

The Secretary of the Interior possesses considerable discretion for determining what is the "value" of production.[7] Indeed, the lease signed by Amoco states that the

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[6] 43 U.S.C. § 1344(a)(4) (Supp. V 1981) states: "Leasing activities shall be conducted to assure receipt of fair market value for lands leased and the rights conveyed by the Federal Government." *See also* 43 U.S.C. § 1344(a)(1) (Supp. V 1981).

[7] In 1977, section 8(b) of OCSLA, 43 U.S.C. § 1377(b) (1976), read: "An oil and gas lease issued by the Secretary pursuant to this section shall * * * require the payment of royalty not less than 12½ per centum in the amount or value of the production saved, removed, or sold from the lease * * *."

Nowhere does the Act provide a process or scheme for determining "value," should royalty be exacted in other than "kind." However, section 5(a)(1) of OCSLA, 43 U.S.C. § 1334(a)(1) (1976) stated in part: "The Secretary shall administer the provisions of this subchapter relating to the leasing of the Outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions." *See also* 43 U.S.C. § 1334(a) (Supp. V 1981) (1978 amendment to OCSLA).

By comparison, section 32 of the Mineral Leasing Act of 1920, 30 U.S.C. § 189 (1976), provides: "The Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this chapter [relating to onshore mineral leasing]." In view of that language, we held that "the Secretary of the Interior has considerable latitude in determining what is the 'value' of production from a lease on which royalty payments are made." *Hoover & Bracken Energies, Inc.*, 52 IBLA 27, 88 I.D. 7 (1981), *rev'd on other grounds, Hoover & Bracken Energies, Inc.* v. *Dept. of Interior*, No. CIV-81-461T (D.C. Okla. Nov. 18, 1981), *appeal docketed*, No. 82-1074 (10th Cir. Jan. 15, 1982). Because of the similarity in authority to manage the respective leasing pro-

lessee "expressly agreed that the Secretary may establish minimum values for purposes of computing royalty on production obtained." The exercise of the Secretary's statutory discretion is found in the promulgation of 30 CFR 250.64, which establishes the factors to be considered when determining value for royalty computations.

The version of 30 CFR 250.64 in effect in 1977 when the value for gas sold to FP&L was determined, read as follows:

> The value of production, for the purpose of computing royalty, shall be the estimated reasonable value of the product as determined by the supervisor, due consideration being given to the highest price paid for a part or for a majority of production of like quality in the same field or area, to the price received by the lessee, to posted prices, and to other relevant matters. Under no circumstances shall the value of production of any of said substances for the purposes of computing royalty be deemed to be less than the gross proceeds accruing to the lessee from the sale thereof or less than the value computed on such reasonable unit value as shall have been determined by the Secretary. In the absence of good reason to the contrary, value computed on the basis of the highest price paid or offered at the time of production in a fair and open market for the major portion of like-quality products produced and sold from the field or area where the leased lands are situated will be considered to be a reasonable value.

(30 CFR 250.64 (1977)). It was amended in 1979 to provide:

> The value of production shall never be less than the fair market value. The value used in the com-

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grams, it would follow that the Secretary enjoys the same discretion to determine value of production with respect to offshore mineral leasing.

> putation of royalty shall be determined by the Director. In establishing the value, the Director shall consider: (a) The highest price paid for a part or for a majority of like-quality products produced from the field or area; (b) the price received by the lessee; (c) posted prices; (d) regulated prices; and (e) other relevant matters. Under no circumstances shall the value of production be less than the gross proceeds accruing to the lessee from the disposition of the produced substances or less than the value computed on the reasonable unit value established by the Secretary.

(30 CFR 250.64 (1982)). *See* 44 FR 61886, 61903 (Oct. 26, 1979). This amendment became effective December 1, 1979, only 19 days before the period in question ended. Under both versions of 30 CFR 250.64, the value for the produced gas is established after consideration of the listed factors, and both provide that the values shall never be less than the proceeds received by the lessee from the sale or disposal of the produced substances or less than the reasonable unit value established.

As noted, the value determination was presented to Amoco, unopposed, in February 1977.[8] Any decision by MMS, or Survey, issued under the regulations concerning Outer Continental Shelf leasing must be appealed to the Director of that agency (MMS or Survey) within 30 days from service of the decision. 30 CFR 250.81; 30 CFR 290.3. The timeliness of Amoco's subsequent attack upon that determination was addressed in the decision appealed. Amoco concedes that it did not appeal the February 1, 1977, determination and waives contesting

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[8] The lease provides that "[e]ach [value] determination [by the Secretary] shall be made only after due notice to the lessee and a reasonable opportunity has been afforded the lessee to be heard." Amoco presented a request for a royalty payment procedure in its Jan. 14, 1977, letter, but did not respond to the subsequent determination.

any royalty disagreement for the period prior to June 1, 1978. It asserts a right to appeal the royalty payments subsequent to "Notice to Lessees 78-2" (NTL) issued by Survey on June 1, 1978, and NGPA, arguing that both superseded the February 1977 determination and restricted the value for royalty computations on gas produced from OCS-G 2866 and received by FP&L to the proceeds obtained under the FP&L contract.

Amoco refers to section II of the NTL which provides that the royalty value for sales not subject to the price jurisdiction of the Federal Energy Regulatory Commission (FERC) and *subject to an arm's-length contract* "shall be established as the higher of: a. The price received by the lessee or operator in accordance with the provisions of the applicable sales contract, or b. A minimum value of not less than 18.36 cents per mcf." [9]

Pursuant to NGPA, effective December 1, 1978, the sale of all natural gas produced in the United States became subject to ceiling price limitations. Amoco argues that under the Act the contract price with FP&L is the maximum lawful price because the gas produced qualifies for sale only under section 105 of NGPA, 15 U.S.C. § 3315 (Supp. V 1981). This section provides that the maximum lawful price for sales of natural gas *under any existing contract to which the gas is subject* which was not committed to interstate commerce in November 1978 shall be the lower of either the price under the terms of the contract or else the price established for "new" uncommitted gas.

Amoco devotes a major portion of its statement of reasons alleging error in the value determination because Survey did not apply all the factors in 30 CFR 250.64. It asserts that Survey failed to explain why the royalty

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[9] MMS, in opposition, argues that the "NTL does not even purport to supersede the effectiveness of the underlying regulations upon which the specific royalty valuation at issue here was based."

valuation was based upon the highest prices available in the market and argues that "like-quality" in this situation means gas to be produced which is committed for sale under a long-term obligation at a price reflecting the 1965 market. Indeed, we have held that there must be a reasonable basis for the determination to set value other than at the actual price received. *Supron Energy Corp.*, 46 IBLA 181 (1980), *appeal pending, Supron Energy Corp.* v. *Watt*, Civ. No. 80-0463 (D.N.M. *filed* June 18, 1980). However, proceeds and fair market value may not be interchangeable when determining value of production. *Wheless Drilling Co.*, 13 IBLA 21, 80 I.D. 599 (1973).

Amoco argues that the Director's decision is inconsistent with precedent. It specifically refers to a Federal Register notice, 47 FR 16423, 16425 (Apr. 16, 1982), which it claims proposed royalty valuation methods for Gulf of Mexico gas. However, the "preliminary finding" appearing in the notice of hearing is not relevant to the present circumstances inasmuch as it was not presented until well after the period in question and, moreover, the scheme presented does not appear inconsistent with that used by Survey in its value determination.

Amoco also cites two Fifth Circuit decisions, *Bowers* v. *Phillips Petroleum*, 692 F.2d 1015 (5th Cir. 1982), and *Flowers* v. *Diamond Shamrock Corp.*, 693 F.2d 1146 (5th Cir. 1982). In holding that the value for royalty computation could not exceed the Federally regulated maximum price, each of those decisions involved gas produced under private lease agreements and subject to a sales contract.

After all of Amoco's arguments are considered, the narrow issue on appeal regarding the value determination is whether the gas produced from OCS-G 2866 and delivered to FP&L was subject to sale under the contract with FP&L. The valuation scheme which Amoco advocates is applicable to the gas delivered to FP&L depends upon the gas being "subject to" an existing contract.

The term "subject to," used in its ordinary sense, means "subordinate to" or "controlled by." *See Black's Law Dictionary* 1278 (5th ed. 1979). Under a "conventional sales" contract for the sale and delivery of natural gas, a producer promises to sell all the gas produced from either specific wells or specific fields. In other words, the production from a specific source is "dedicated" to the fulfillment of the contract. In a "warranty" contract, the producer agrees to sell a specific amount of gas and the gas delivered in satisfaction of this obligation may come from any source without, regard to designated wells or fields. *Shell Oil Co.* v. *Federal Power Commission*, 531 F.2d 1324, 1327 n.6 (5th Cir. 1976).

The contract with FP&L does not specify a particular source, viz.: "Sellers own or control oil, gas and mineral leaseholds and/or lands in Southern Louisiana and offshore thereof, and Sellers will have a supply of gas available from their respective properties." In fulfilling the obligation to deliver, "[Sellers] may offer [gas] belonging to others." FP&L agrees "to purchase and receive, or pay for if available and not taken, from Sellers, collectively, the applicable Contract Demand Quantity per day, average over each month," which quantity was originally set as 100,000 MMBTU [10] until December 31, 1967, and 200,000 MMBTU thereafter until the first occurrence of either the delivery of 1,424,500,000 MMBTU or the twentieth anniversary of the first delivery under the contract. Amoco continually argues that it was obligated by the contract to sell only gas produced from OCS-G 2866 or other sources in the area. The contract provisions do not support such conclusion. Furthermore, Amoco's statement that the contract is no longer a "warranty contract" is irrelevant to the period in question. The agreement was not converted to a "conventional sales contract"

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[10] MMBTU represents the quantity of natural gas which contains the equivalent of 1,000,000 British thermal units (total heating value).

until June 9, 1982.[11] Prior to that time Amoco had simply chosen to satisfy its contractual obligations to FP&L by delivering gas from OCS-G 2866. That business election cannot bind the United States to accept a lower royalty than it otherwise would be entitled had Amoco chosen some other source of supply for FP&L.

With regard to Amoco's assertion that it was locked into the price it received from FP&L, we note the Fifth Circuit decision in *Shell Oil Co.* v. *Federal Power Commission, supra.* The decision there was based on the determination that a contract to deliver a specified amount of gas at a specified price, or a warranty contract, did not preclude the seller from seeking approval from FPC of higher prices for gas from sources previously used to supply the buyer under the warranty. Likewise, Amoco was not prevented from selling at a higher price the gas produced from OCS-G 2866.

MMS' declaration of underpaid royalties does not create unjust enrichment. Under the circumstances, Amoco's obligation to pay royalties at prevailing "highest price" or "fair market value" is not lessened because it has made long term warranty commitments. The regulations clearly allow the superimposition of a value determination based on actual market conditions on any sales price which falls below the standard of reasonableness. The United States is entitled to its royalty based on "the reasonable value" of the gas as set by the Secretary, which may not be less than the highest price received for similar gas.

Where a party challenges a determination as to the value of gas or other hydrocarbons produced from a lease

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[11] The Aug. 4, 1967, agreement which reinstated the FP&L contract provided that after the expiration of 15 years following the date of initial deliveries of gas, the sellers were obligated thereafter to deliver all gas produced from wells which were being used at that time to supply the gas delivered to FP&L under the contract. We do not address the efficacy or effect of that provision.

with the United States, the party must establish that the methodology used is, in fact, erroneous. *Supron Energy Corp.*, 55 IBLA 318, 322 (1981), *appeal pending, Atlantic Richfield* v. *Watt*, Civ. No. 81-0615 (D.N.M. *filed* July 29, 1981). Survey's February 1, 1977, value determination letter established the category of gas sold to FP&L and the July 20, 1982, determination provided Amoco with the corrected computations of the royalties owed. Amoco has failed to demonstrate error in the Director's decision upholding the value determination and royalty recomputation.

[2] In regard to the late payment assessment, Amoco claims that such charge is premature because the matter was pending and its liability was unsettled. 30 CFR 250.49 authorizes MMS to impose a late payment interest charge where payments are untimely or improper, including underpayments. *See Atlantic Richfield Co.*, 21 IBLA 98, 82 I.D. 316 (1975). The charges under 30 CFR 250.49 are assessed from the date on which the payment was due until the date on which it was received.

Amoco claims that Survey was informed of its payment method in July 1979 and delayed in correcting the situation. It argues that the subsequent requirement to pay interest violates the "most fundamental notions of equity" in the face of such delay.

A discussion of equity necessarily includes a review of the underlying circumstances. Amoco was informed of the royalty payment procedures and the attendant value computation scheme for the sale of gas from OCS-G 2866 to FP&L. It could have promptly paid the monies due, accompanied by a protest, but apparently chose not to do so. Thus, it appears that it decided to use the funds rather than pay them to the United States, based on a hope that its interpretation of 30 CFR 250.64 would prevail. It is equitable that the United States should be compensated for the loss of the use of the funds due it under an express royalty computation and payment program.

As to Amoco's assertion that the Government is precluded from collection of the interest charge because of a failure to act, it is well established that the authority of the United States to enforce a public right or to protect a public interest is not vitiated or lost by acquiescence of its officers or by their laches, neglect of duty, failure to act, or delays in the performance of their duties. *Alyson A. Allison*, 72 IBLA 333 (1983); *Warren L. Jacobs*, 71 IBLA 385 (1983). This recognizes the realities of administering the collection of royalties. When the lessee's reports and payments are received, MMS cannot immediately know the correctness of such material. It must necessarily take time to assemble the necessary data and then interpret it. Delays are reasonable in view of the burden upon it to perform this audit function for the many leases it must manage. Postpayment audits are a common incident to mineral lease management. *See e.g., Mobil Oil Corp.*, 65 IBLA 295 (1982). Contrary to Amoco's claim, the delay in its payment of the correct amount due is attributable to its own activities and not those of MMS.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

/s/ Edward W. Stuebing
EDWARD W. STUEBING
Administrative Judge

We concur:

/s/ C. Randall Grant, Jr.
C. RANDALL GRANT, JR.
Administrative Judge

/s/ Douglas E. Henriques
DOUGLAS E. HENRIQUES
Administrative Judge

APPENDIX G

FERC Actions.

¶ 4,972 LETTER OPINION—SECTION 105
Office of the General Counsel
Tipperary Corp.
April 8, 1982

FEDERAL ENERGY REGULATORY COMMISSION
Washington, D.C. 20426

Office of the General Counsel

April 8, 1982

George P. Goolsby, Esquire
Baker & Botts
One Shell Plaza
Houston, Texas 77002

Dear Mr. Goolsby:

This is in response to your letter of September 15, 1981, in which you requested, on behalf of Tipperary Corporation, an interpretation from the General Counsel of the Federal Energy Regulatory Commission (Commission). Your request involves the applicability of section 105 of the Natural Gas Policy Act of 1978 (NGPA) to certain first sales of natural gas and relates to facts which are restated in part below.

On February 22, 1977, South Slope Gas Company, a Texas partnership composed of Tipperary Corporation and Mr. J. L. Davis, executed a gas purchase contract (the Contract), as Seller, with LoVaca Gathering Company (now the Valero Transmission Company), an intrastate pipeline, as Buyer. As in your letter, I shall refer to these parties as Buyer and Seller.

Seller purchases natural gas from producers under contracts referred to in the Contract and herein as Seller's Contracts. After processing, Seller sells the residue gas to Buyer at the tailgate of Seller's processing facility in Frio County, Texas. As stated in your request, Article III of the Contract pertains to the commitment of natural gas and provides for the addition of new gas supplies to the Contract as follows:

> 1. Except as herein otherwise provided, and subject to the terms and conditions of this Contract, Seller agrees to sell and deliver to Buyer and Buyer hereby agrees to purchase and receive from Seller, all gas purchased by Seller pursuant to Seller's Contracts and Seller hereby commits to the performance of this Contract, gas purchased from producers pursuant Seller's Contracts.
>
> 2. Seller may from time to time during the term hereof, acquire additional Seller's Contracts covering additional lands and leases and the gas production therefrom, outside of the area outlined on Exhibit "A-1" hereof. In such event, Seller, at its option, may connect and deliver through its facilities such additional gas to Buyer and the same shall be considered committed and dedicated to this Contract under all its terms and conditions herein contained after a formal amendment is executed dedicating the land from which such additional gas is derived.

You stated in your request that additional acreage was committed to the Contract in 1977 and that the Contract was amended twice in 1977 to reflect those additions. On several other occasions both before and after enactment of the NGPA, Seller has added additional supplies of gas to the Contract. Although no formal amendments have been made to the Contract to reflect these additions, you state that Buyer and Seller have treated these new gas supplies as committed to the Contract. You further

state that, in order to create a complete listing of these new supplies, Buyer and Seller intend to execute a formal amendment to the Contract reflecting these new supplies and effective as of the date of first delivery of gas from each additional source.

In practice, Seller has sold all of the gas referred to above under section 105(b)(1) of the NGPA since the contract price on date of enactment was less than $2.06 per MMBtu, the section 102 maximum lawful price on that date. Under the terms of the Contract, the price is redetermined each March to the "prevailing price" in the area which has been determined each year since passage of the NGPA to be the section 102 price for the preceding month of February.

Finally, you state that all of the gas that has been added to the Contract without formal amendment is produced from "new wells" for which NGPA section 103 eligibility applications have been filed. No gas sold under the Contract qualifies under section 102 of the NGPA.

Based on the above facts, you ask whether all of the natural gas sold under the Contract, including the gas for which no formal amendments have been executed, is properly priced under section 105(b)(1) of the NGPA. If not, you ask what NGPA price would be applicable to gas which first flowed to the Buyer after the date of enactment of the NGPA.

In order to qualify for the maximum lawful price established in section 105 of the NGPA, natural gas must be sold under an existing contract (or a successor to an existing contract) and must not have been committed or dedicated to interstate commerce on November 8, 1978. As defined in section 2(13) of the NGPA, an "existing contract" is simply a contract for the first sale of natural gas which was in effect on November 8, 1978. It appears from your request that none of the subject gas was committed or dedicated to interstate commerce on

November 8, 1978. Furthermore, since the Contract was in effect on that date, it is an existing contract. The question becomes, therefore, whether all of the subject gas is natural gas "sold under" an existing contract for purposes of section 105.

In your request, you recognize that an existing contract cannot be amended to include gas that was not subject to the contract on date of enactment. Otherwise, producers could rearrange their contractual obligations in an area to funnel all gas production through the most beneficial contract in the area. Such a process would violate the congressional policy expressed in section 105 to hold intrastate sellers of flowing gas to bargains reached before date of enactment.

Furthermore, the section 105(b)(1) price is expressed as the lower of the section 102 price or "the price under the terms of the existing contract, *to which such natural gas was subject on the date of enactment of this Act*, as such contract was in effect on such date." The wording of section 105(b)(1) is a clear indication that Congress intended section 105 to apply only to gas that was subject to an existing intrastate contract on the date of enactment. The maximum lawful price for "natural gas which was not committed or dedicated to interstate commerce on the day before the date of enactment of the Act and which was not subject to an existing contract on such day" is set in section 109. *See* NGPA § 109 (a)(3). Therefore, only gas that was subject to the Contract on the date of enactment of the NGPA qualifies for the section 105(b)(1) price.

The gas which is currently being sold under the Contract comes from four sources: (1) acreage described in the Contract as originally executed; (2) acreage added to the Contract by formal amendment in 1977; (3) acreage from which gas was sold under the Contract without formal amendment before the NGPA was enacted; and (4) acreage from which gas was first sold under the Contract after the NGPA was enacted.

Natural gas from the first two sources mentioned above was dedicated to the Contract, either in the Contract itself or by formal amendment, before the NGPA was passed. Accordingly, all of the gas from these two sources was subject to the Contract on date of enactment and qualifies for the section 105 price.

Whether natural gas from acreage from which gas was sold under the contract without formal amendment before the NGPA was enacted was subject to the Contract on date of enactment is a matter of contract interpretation. Under the so-called "option clause" quoted above from section III, paragraph 2 of the Contract, the Seller has the option to deliver gas from new sources through its processing facility. However, under this clause, such gas is not considered to be committed and dedicated to the Contract until a formal amendment is executed dedicating the new acreage. Whether gas from this acreage was subject to the Contract on date of enactment, and thus qualifies for the section 105 price, depends upon the legal implications of delivering such gas without a formal amendment. This is a question of state contract law.

If, under state law, the Contract was amended by the conduct of the parties despite the stated requirement of a formal amendment such that natural gas delivered to the Buyer before passage of the NGPA was subject to the Contract at that time, gas from this acreage would qualify for the section 105(b)(1) price. The Commission has stated that questions of contract interpretation such as this are left, in the first instance, to the contract parties and, in the event of their disagreement, to the applicable state court. *See* Order No. 23, Docket No. RM79-22 (March 13, 1979), 44 *Fed. Reg.* 16895 (March 20, 1979).

Natural gas from acreage from which gas was first sold under the Contract after the NGPA was enacted was not subject to the Contract on date of enactment. Although

the Contract as it was in effect on date of enactment contemplated the addition of new supplies, there was no requirement on date of enactment that the Seller dedicate these particular supplies to the Contract nor, as far as the facts in your letter relate, was there any requirement at that time that the producers of gas from such acreage sell the gas to the Seller. Accordingly, this gas does not qualify for the section 105(b)(1) price.

The maximum lawful price for gas that does not qualify under section 105(b)(1) is, of course, the highest maximum lawful price under the NGPA for which the gas does qualify. Since you indicate that all of the natural gas from acreage added to the Contract after passage of the NGPA will qualify under section 103, but not under section 102, it appears that the maximum lawful prices for this gas is the section 103 price, subject to filing requirements and affirmative section 103 determinations.

You should be aware that a copy of your request and this response have been placed in the Commission's public files and will be available for public inspection. However, only those persons to whom an interpretation is addressed and identified parties to the subject transaction, who have been informed of the request, may rely upon it. No one may rely upon an interpretation if such facts change, or if the actions taken differ from the facts presented in the application. Finally, the views expressed here are mine, as General Counsel, and do not bind the Commission in any manner. A full explanation of the scope and limitations of an interpretation is provided in the Commission's regulations setting forth procedures for seeking interpretations or declaratory orders under the NGPA, 18 C.F.R. § 1.42, 44 *Fed. Reg.* 48171 (Aug. 17, 1979).

Sincerely,

/s/ Charles A. Moore
CHARLES A. MOORE
General Counsel

APPENDIX H

FERC Actions

¶ 4,391 LETTER OPINION—SECTION 105
Office of General Counsel
Individual Request, February 4, 1980

FEDERAL ENERGY REGULATORY COMMISSION
Washington, D.C. 20426

Feb. 4, 1980

Mssrs. Brad S. Figley and
Robert K. Dannhauser
Houston, Cohen, Harbaugh & Lippard
2990 U. S. Steel Building
600 Grant Street
Pittsburgh, Pennsylvania 15219

Gentlemen:

This is in response to your letter of August 9, 1979, requesting our opinion as to which sections of the Natural Gas Policy Act of 1978 (NGPA) would be applicable to several factual situations which you present.

Briefly stated, I have not concurred with all the results of your analysis pertaining to the several hypothetical situations that you have presented. The reasons supporting my position are set out below. In all these cases, you should be advised that even where the gas in question qualifies for a price higher than the section 105 maximum lawful price, that payment of the higher ceiling price would not be required unless the terms of the contract between the parties authorize the collection of such higher price, or the parties amend their contract so as to provide such authorization. The NGPA does not require a purchaser to pay a price higher than that provided under the terms of the contract between the parties.

Situation A

In situation A, the buyer and seller are engaged in a sale of natural gas under an existing intrastate contract as defined in § 270.102(b) (8) of the Commission's Rules and Regulations. The terms of the contract provide that the seller will sell to the buyer all the natural gas produced from existing wells on specific and identified leases covering property located in Pennsylvania. The contract further provides that the seller may drill additional wells on such leases and that the natural gas produced therefrom must be sold to the buyer. Assuming that new wells are drilled on the appropriate leases, and that they are drilled in 1979, the issue which arises is what is the maximum lawful price applicable to the natural gas produced from these oil wells, under the NGPA.

Inasmuch as the sale of the natural gas from the newly drilled wells to the original purchaser will be made pursuant to the existing intrastate contract between them, the maximum lawful price will be determined with reference to section 105 of the NGPA, which covers sales under existing intrastate contracts.

The rules for determining the applicable maximum lawful price for sales under existing intrastate contracts are set out in Subpart E of Part 271 of the Commission's Rules and Regulations. The general rule for determining the maximum lawful price where the contract price did not exceed the new gas ceiling price of $2.060/MMbtu on November 9, 1978, is that the maximum lawful price is the lower of (1) the price under the terms of the existing contract to which the natural gas was subject on November 8, 1978, as the contract was in effect on that date, or (2) the maximum lawful price per million Btu's computed for such month for new gas under section 102 of the NGPA. If the contract price exceeded the new gas ceiling price on November 8, 1978, the maximum lawful price will be the higher of (1) the maximum lawful price under § 102 of the NGPA, or (2) the

contract price on November 8, 1978 for that November, and for any subsequent month, the maximum lawful price prescribed for the preceding month multiplied by the monthly equivalent of the annual inflation adjustment factor applicable for such month.

The price thus established by these rules is the maximum lawful price under section 105 of the NGPA for such natural gas. However, as your letter points out, § 101(b)(5) of the NGPA provides that if a sale of natural gas qualifies under more than one provision of Title I of the NGPA, the provision which would result in the highest maximum lawful price shall be applied. If the gas in this hypothetical situation potentially qualified under another section of Title I the purchaser is not required to pay the higher ceiling price unless the contract so provides or the parties amended the contract to provide authorization for the collection of such higher price. This outcome is mandated by § 101(b)(9) which states that the maximum lawful price for which natural gas qualifies shall not supersede or nullify the effectiveness of the price established by the contract. This result is also expressed in the Statement of Managers which accompanied the NGPA, wherein it was stated that in no case may a seller receive more for natural gas than the contract allows. (See p. 74 and p. 83 of the Conference Report of the NGPA, issued October 10, 1978). This statutory mandate, however, is not intended to bar the parties from amending the existing contract to provide for the collection of rates under the highest maximum lawful price for which the natural gas qualifies.

Situation B

In this situation, new wells are drilled by the seller in 1979, but rather than selling the natural gas produced from these wells to the Buyer, the Seller and Buyer agree that the Seller may sell the gas to an unrelated third party. The provisions of section 105(a) would enable the

gas sold to the unrelated third party to qualify for the section 105 maximum lawful price, if the contract between the seller and the third party qualifies as a "successor to an existing contract," as defined in section 2(14) of the NGPA.

Section 2(14) defines "successor to an existing contract" to mean any contract, other than the rollover contract, entered into on or after the date of enactment of this Act, for the first sale of natural gas which was previously subject to an existing contract, whether or not there is an identity of parties or terms with those of such existing contract. Under section 2(14) the crucial factor becomes whether the gas was previously subject to an existing contract. In this situation, the existing contract specifically identified the wells and leases whose production would be subject to it. It is easily determined that the gas which is to be sold to the new, third party purchasers is subject to the existing contract, and thus is eligible for the section 105 price applicable to sales under existing intrastate contracts. Once again, it should be noted that the purchaser is not required under the NGPA to pay the producer a price which exceeds that authorized by the contract between the parties, where this contract price is below the applicable maximum lawful price. The contract may be amended to authorize collection of a price up to the maximum lawful price.

Situation C

In this situation, the existing intrastate contract for sale between the Seller and Buyer is a volume requirements contract, which sets a specified amount of natural gas that must be sold, but does not identify leases or wells from which the gas must be supplied except that the wells must be in Pennsylvania. The Seller is under an obligation to drill additional wells when required to meet the volume requirements of the contract. Such wells are drilled in 1979 on Pennsylvania leases. Although the

wells were drilled after the enactment of the NGPA, the natural gas produced therefrom is sold pursuant to a contract which is an existing intrastate contract under section 105 of the NGPA. The price established by reference to section 105 will be the applicable maximum lawful price. Once again, as in the preceding hypotheticals, the price collectible shall not exceed that which is permitted by the contract, even where the natural gas is determined to qualify under another section of Title I. However, the contract may be amended to allow for such collection.

Situation D

The facts are the same as in Situation C, except that the new wells drilled to meet the Buyer's requirements are able to meet all the Buyer's requirements, with the result that the natural gas produced from the original wells is no longer needed and is consequently sold to a new buyer under a new intrastate contract. In the analysis in your letter you stated that inasmuch as the gas from the old wells had been previously subject to an existing intrastate contract and is now to be sold under a contract which qualifies as a "successor" to an intrastate contract under section 2(14) of the NGPA and section 270.102 (b)(9) of the regulations, the section 105 price would apply to the gas produced from these old wells. I disagree with this analysis and the attendant result. As stated previously, in order for a contract to qualify as a "successor to an existing contract", the natural gas to be sold under the successor contract must previously have been subject to the existing contract. In Situation B it was easily determined that gas, not as yet recovered, was subject to the existing contract because that contract had specified leases and wells which were subject to it. The contract in this situation, however, is a volume requirements contract, with the only identification of gas being that such gas be produced from Pennsylvania leases. The nature of the volume requirements contract

as presented in your request precludes any natural gas from being classified as subject to such contracts, except for such natural gas which has actually been produced and sold under such contracts.

Consequently, the applicable maximum lawful price for natural gas sold as described in this fact situation will depend on other characteristics of the gas produced and the well, but in any case would not fall under section 105 as a successor to an existing intrastate contract.

Situation E

As in Situation D, a new well is required to be drilled to compensate for declining production in existing wells and meet the volume requirements of the Buyer. Only 50% of the natural gas produced from the new well is needed for the requirements of the original Buyer, and so the excess 50% is sold to a third party by the Seller under a new contract.

The natural gas sold to the original Buyer would fall under section 105, as natural gas sold pursuant to an existing intrastate contract. The gas sold from the new well to the third party under the new contract would not be natural gas previously subject to an existing contract as it was not covered by the contract between the Seller and original Buyer, and the contract under which it was covered was entered into after the enactment of the NGPA. Thus, the natural gas sold under the new contract would not come under section 105. The characteristics of the natural gas sold to the new buyer would have to be examined to determine which section would apply to its sale under Title I. Such section would set the maximum lawful price. Section 101(b)(9) would require that the price provided for in the contract, either the original existing intrastate contract or the contract with the new buyer, would not be superceded or nullified by the maximum allowable lawful price.

Situation F

This fact pattern differs from Situation E in that two new wells are drilled, one a year after the first. The second well produced in sufficient quantities to meet the Buyer's requirements, and so the Seller then sells the natural gas produced by the first new well to a third party, under a new contract.

The natural gas from the first new well when sold to the original buyer qualifies under section 105 as being sold under an existing intrastate contract. However, gas sold under the new contract with the third party would not come under section 105 for the reasons discussed above, with reference to situation D. The natural gas sold under the new contract was never "previously subject to an existing contract" under Section 2(14) and so section 105 would be inapplicable. The maximum lawful price would have to be determined upon examination of the characteristics of the well itself.

You should be aware that a copy of your request and this response has been placed in the Commission's public files and will be available for public inspection. However, only those persons to whom an interpretation is addressed and identified parties to the subject transaction, who have been informed of the request, may rely upon it. No one may rely upon an interpretation if material or relevant facts are misrepresented or omitted, if such facts change, or if the actions taken differ from the facts presented in the application. Finally, the views expressed here are mine, as General Counsel, and do not bind the Commission in any manner. A full explanation of the scope and limitations of an interpretation is provided in the Commission's order establishing procedures for seeking interpretations or declaratory orders under the NGPA, issued on August 7, 1979, in Docket No. RM79-65, 44 *Fed. Reg.* 48171 (Aug. 17, 1979).

I hope this letter will be of assistance to you. Please excuse the delay in responding to your request. For fu-

ture reference I would like to call to your attention, § 1.42 of the Commission's Regulations that sets forth procedures for obtaining interpretations under the NGPA. Under § 1.42(a)(2)(ii) of these procedures, interpretations based on hypothetical facts, acts, or transactions will not be considered.

Sincerely,

/s/ Robert R. Nordhaus
ROBERT R. NORDHAUS
General Counsel